

**FOOTHILL/EASTERN TRANSPORTATION CORRIDOR
AGENCY**

CC No. CC-018-07

APPROVAL OF FTC-S: BALANCING UNDER COASTAL ACT SECTION 30007.5

SUBMITTED TO COASTAL COMMISSION FEBRUARY 4, 2008

TRANSPORTATION CORRIDOR AGENCIES

Valarie McFall

Acting Deputy Director

Environmental Planning

949/754-3475

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I. RESOLVING CONFLICTS BETWEEN COASTAL ACT POLICIES AND THE USE OF BALANCING

A. Application of the “Balancing” Provision to FTC-S

The Commission has approved transportation and other projects under the “balancing” provision in Section 30007.5. Indeed, it has repeatedly approved such projects (especially for important regional transportation infrastructure) under precisely the same circumstances that are presented by FTC-S.

In the case of FTC-S, balancing is perfectly appropriate to resolve conflicts between the wetland and ESHA protection policies of the Coastal Act (Sections 30233 and 30240) and the policies of the Act which promote improved water quality (Section 30231), public access (Section 30210), encouragement of lower cost visitor-serving and recreational facilities (Section 30213), and public safety (Section 30253). On balance, the latter provide a greater level of consistency with the Coastal Act.

The Commission has employed “balancing” judiciously, but has not been reluctant to do so when, as here, resolution of conflicting coastal policies produces a result that is most protective of coastal resources.

RECENT COMMISSION BALANCING DECISIONS: APPROVED TRANSPORTATION PROJECTS

DECISION	YEAR	PROJECT DESCRIPTION	SECTIONS BALANCED
CC-004-05 (North County Transit District)	2007	Passing track extension and bridge	30233 (wetlands), 30240 (ESHA) VS. 30231 (water quality), 30252 (public access), and 30253 (air quality and energy conservation)
CC-004-05 (North County Transit District)	2005	Construction of second railroad tracks	30233 (wetlands), 30240 (ESHA) VS. 30231 (water quality), 30252 (public access), and 30253 (air quality and energy conservation)
CDPM 9-98-127 (City of San Diego)	2000	Construction of SR-56 freeway segment	30233 (wetlands), 30240 (ESHA) VS. 30210 (public access), 30231 (water quality)

4-97-276 (County of Los Angeles Department of Public Works)	2000	Demolition and construction of bridge over creek in Topanga	30240 (ESHA) VS. 30253 (Public Safety)
CC-64-92/5-92-232 (Transportation Corridor Agency)	1993	Construction of San Joaquin Hills Transportation Corridor Toll Road (SR-73)	30233 (wetlands), 30240 (ESHA) VS. 30210-30213, 30252 and 30253 (public access)

All five previous Commission decisions bear discussion because (a) two are directly comparable to the FTC-S project, involving two important routes in the State Highway system, including a previously approved toll road; (b) two others represent major regional transportation projects parallel to I-5 in north San Diego County; and (c) one was balanced using the public safety policy in the Coastal Act.

- **State Route 56:** In Application No. 6-98-127, the Commission approved the coastal zone portion of the middle segment of State Route 56 to complete an east-west freeway connection between I-5 and I-15. The Commission first found that the project would result in permanent impacts to 0.427 acres of wetlands (in contrast to 0.16 acre here) and two acres of sensitive upland plants. Nonetheless, the Commission employed “balancing,” finding wetland protection outweighed by state-of-the art water quality improvements that, as here, would reduce contaminants and thereby enhance the use of downstream resources by wildlife and humans. The Commission further found wetland protection outweighed by the fact that “completion of this east-west highway connector, identified in many regional planning documents for decades, will enhance public access to the coast by reducing required travel times from these developing inland communities to the shorelines of Del Mar and Torrey Pines. Without the construction of the middle segment of SR-56, the mandate of Section 30210 of the Coastal Act to maximize public access to the coast will not be fully realized.” Thus, the Commission concluded that this major transportation project, on balance, would be most protective of coastal resources.

- **State Route 73 Toll Road:** In CC-63-92, the Commission approved a combined CDP and Consistency Certification for construction of a small segment of the 17.5-mile toll road (San Joaquin Hills Transportation Corridor) within the coastal zone. The Commission found that the project would fill 0.33 acre of wetland in the coastal zone and 10 acres of coastal sage scrub habitat within the coastal zone. The Commission also found that the project would impact 15 acres of wetlands outside of the coastal zone and 150 acres of coastal sage scrub outside of the coastal zone. However, it further found that denial of the project would conflict with the public access policies of the Coastal Act: Finding approval of the project, on balance, to be most protective of coastal resources, the Commission explained:

“ . . . [T]he No Project Alternative would result in either a significant overload of the transportation system capacity of Pacific Coast Highway or significant adverse impacts to coastal communities and public recreational areas necessitated by future widenings of PCH. The City of Laguna Beach has already stated its opposition to the latter and has articulated a “planned deficiency” approach to PCH through Laguna Beach (in findings of approval for the Irvine Coast Development Agreement EIR). Consequently, the failure to approve the SJHTC would result in impacts contrary to Sections 30001.5, 30210, 30212, 30212.5, 30213, 30223, 30240, 30253.5 and 30254 of the Coastal Act either as a result of failing to provide for adequate transportation system access to coastal and upland support recreational areas or as a consequence of impelling the widening of PCH in a manner resulting in significant impacts both to coastal communities and to public recreational areas.”

- **North County Transit District (NCTD) Double Tracking Project:** In CC-004-05, the Commission approved a Consistency Certification for construction of a second 2.7-mile long railroad track, just east of I-5 on Camp Pendleton. The Commission found that the project would fill 0.65 acre of wetland and 2.18 acres of sensitive upland vegetation (CSS and native grassland), and noted it would impact one pair of coastal California gnatcatchers and two pairs of least Bell's vireo. However, the

Commission found that denial of the project would conflict with the public access policies of the Coastal Act, as well as the policies promoting water quality, air quality, energy conservation, and reductions in vehicle miles traveled. Finding the project to be most protective of coastal resources, the Commission explained:

“If the Commission were to object to the proposed project based on environmentally sensitive habitat/wetland policy requirements, the result would frustrate public access and lead to conditions that are inconsistent with the access policies (Section 30210). Such an objection would also result in adverse effects to coastal waters and the air basin and be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. In resolving the Coastal Act conflict raised, the Commission finds that the impact on coastal resources from not constructing the project would be more significant and adverse than the project’s ESHA and wetland habitat impacts, which will be mitigated.”

The Commission approved a plan for mitigation by NCTD at Foss Lake, outside the coastal zone.

- **North County Transit District (NCTD) Railroad Passing Track Extension:** In CC-008-07, the Commission approved a Consistency Certification for construction of a 1.2-mile long railroad passing track, and construction of a new railroad bridge and replacement of an existing bridge over Loma Alta Creek near Oceanside. The Commission found that the project would fill 0.1 acre of wetland. However, the Commission found that denial of the project would, again, conflict with the public access policies of the Coastal Act and the policies promoting water quality, air quality, energy conservation, and reductions in vehicle miles traveled. The Commission balanced, finding the project to be most protective of coastal resources, based on the same rationale explained in the Commission’s approval of NCTD’s double tracking project.
- **County of Los Angeles Department of Public Works (LACDPW) Red Rock Creek Bridge Construction:** In 4-97-216, the Commission

approved a CDP for demolition and construction of a bridge at the crossing of Old Topanga Road and Red Rock Creek in the old Topanga area of Los Angeles County. The existing bridge provided a roost for approximately 300 Mexican free-tailed bats, which bridge construction would destroy. While the bats did not have a special status, the Commission noted that they fill an important niche within the Santa Monica Mountains ecosystem, providing insect and mosquito population control. The Commission balanced, finding the public safety policy of the Coastal Act to outweigh ESHA impacts, explaining:

“Old Topanga Canyon Road is an important roadway and is a crucial transportation link in the Topanga Canyon area of the Santa Monica Mountains. In addition, failure of the existing bridge or failure to reconstruct a new bridge after demolition would sever an important public transportation corridor in the Santa Monica Mountains and severely limit access to hundreds of homes in the surrounding area (including emergency vehicle access) creating a hazardous condition in an area prone to wildfire activity. As such, the Commission notes that the proposed project is necessary to ensure the stability and structural integrity of an existing stream crossing and will serve to minimize risks to life and property as required by Section 30253 of the Coastal Act.”

The Staff Report states on page 23 that “it strongly disagrees with the argument that any of these situations [SR 73, SR-56, and NCTD] are comparable to the situation raised by the proposed road . . .” However, this supposed disagreement is 180 degrees the opposite of this Commission’s decisions on comparable projects. If the Commission were to object to the proposed project on wetland and ESHA policy grounds, that would frustrate public access and lead to conditions that are inconsistent with the access policies in Sections 30210, 30252, and additionally be inconsistent with the lower cost visitor-serving recreational use, water quality, and public safety policies in Sections 30213, 30231, and 30253.

First, as part of regional transportation plans that have been developed over the course of decades, the project will complete the connection between SR-91 and I-5, thus facilitating significant new and more direct and convenient public access

from inland areas to coastal recreational areas in southern Orange County and northern San Diego County. Access to and along this portion of the coast is currently restricted because of severe traffic congestion on I-5. Because of this congestion, significant congestion is also occurring on local streets in the coastal community of San Clemente on the weekends as drivers attempt to avoid I-5 congestion. This results in additional significant barriers to coastal access. Without construction of the remaining segment of the toll road, the mandate of Sections 30210 through 30214 and Section 30252 of the Coastal Act to maximize public access to the coast will not be fully realized. The project's benefit to, and consistency with the Act's public access policies, is obvious.

The Staff Report disingenuously states on page 29 that TCA has not "quantified" its stated benefit of bringing additional visitors to the coast, and that TCA has not provided evidence that significant numbers of recreational travelers, as opposed to commuters, will be willing to pay tolls to reduce travel times. The Staff Report agrees that I-5 weekend traffic is heavy; but states that nevertheless existing toll road use on weekends remains low.

Yet, the exact same benefit to public coastal access, without more, was transparently obvious to Commission staff and the Commission in connection with the toll road approval (SR-73) discussed above and again not less than six months ago, when the Commission approved the consistency certification for the North County Transit District's 1.2-mile railroad passing track extension and bridges project. The Commission "balanced" impacts to wetlands, explaining:

"The Commission finds that traffic congestion interferes with access to the coastal recreational opportunities within northern San Diego County (including travelers from Los Angeles and Orange Counties). As traffic congestion increases with expected growth of the region, these access impacts will worsen, and when congestion increases, non-essential trips such as those for recreational purposes tend to be among the first to be curtailed. Thus, as the traffic increases, the ability for the public to get to the coast will become more difficult, which would result in a condition that would be inconsistent with the access policies of the Coastal Act." (CD-008-07)

Public access to the beach and other coastal recreational amenities in northern San Diego County and southern Orange County are presently severely constrained by traffic congestion, especially on the weekends and holidays. Weekday traffic is projected to increase 60% by 2025, and weekend traffic is projected to be higher still. The high weekend traffic on I-5 has a spillover impact on local roads in San Clemente, Dana Point and San Juan Capistrano and creates further barriers to coastal access.

Beachgoers from the inland areas will either pay the toll or use SR-241 because it is quicker or will use the I-5 because it is less congested and because completion of SR-241 has greatly reduced travel times. Either way, the project will significantly benefit public access, exactly as the Commission found in the recent North County Transit District railway extension and bridge project and also in the SR-56 decision, as noted above.

On the issue of public access, project opponents ignore that the project will greatly benefit public access overall to the many coastal access destination points in northern San Diego County and southern Orange County. (See letters from project opponents to the Commission, dated September 24, 2007 and January 17, 2008.) These include: San Clemente State Beach, Doheney State Beach, Dana Point Harbor, Salt Creek Beach, and Crystal Cove State Beach. Instead, they focus only on San Onofre State Beach. First, the project opponents erroneously argue that San Mateo Campground will be abandoned as a consequence of the FTC-S. The Resources Agency has explained that this will not occur.

Moreover, even DPR in its 1997 *Mitigation Assessment of FTC-S Impacts to San Onofre State Beach*, candidly explained that “*San Onofre State Beach would continue to be a popular park because of its location on the Southern California coastline and the coastal recreation opportunities it offers,*” and while FTC-S may have some impact on subunit 1, “***FTC-S will provide greater access to the coast and substantially increase park visitation levels***” (pp. A-3 and 4).

The project opponents also incorrectly assert that there is no evidence that this park’s visitors have access problems due to traffic congestion. A more candid assessment was provided in a recent Christmas Day article in the local Orange County Register, where a San Clemente surfer explained, as to his trips to San

Onofre State Beach: *“Like many in Southern California, I’d spent hours in my car in the Summer waiting in the heat to simply get into the State Beach, only to wait again in the lineup to secure my own wave.”*¹ (See Attachment 24, *Santa Safari, Orange County Register, December 2007*)

Second, and still further in terms of public access and additionally the promotion of lower cost visitor-serving and recreation facilities, the Staff Report ignores the public access and recreation benefits afforded by TCA’s extraordinary \$100 million State Parks package. The TCA has included within its project description the commitment to provide \$100 million for park and coastal access improvements that would be available for use for San Onofre State Beach, San Clemente State Beach, Crystal Cove State Park and other coastal park units in Los Angeles, Orange and San Diego Counties. This package is particularly key to funding state park access and recreation projects in light of the 10% reduction that the Governor has ordered in the budgets of every State agency, including State Parks, and constraints on the State parks as a result. Each element of TCA’s funding package undeniably provides an opportunity for extraordinary access, recreation, and habitat benefits which far outweigh any impact on wetlands or ESHA that the project may create.

TCA believes the State Parks package should be addressed by a condition requiring a State Parks Improvement Plan to benefit access and recreation at State parks within the coastal zone portion of the State Park system. The Plan would be brought back to the Commission for action, after a public hearing, to more specifically identify the general uses to which the funds offered would be put.

Third, the Commission has repeatedly employed “balancing” where a project, as here, will significantly improve water quality. The Staff Report’s discussion of each of the precedents cited demonstrates the obvious: the improvement of water quality along the coast is a serious and important issue to the Commission.

FTC-S will significantly improve water quality by treating approximately five million gallons of runoff from the I-5 each year that currently flow untreated into San Onofre and San Mateo Creeks and to Trestles Beach. It will do so,

¹ “Santa Safari – A family’s Christmas tradition includes presents and, with luck, a decent break.” *Orange County Register*(December 25, 2007).

employing a state-of-the-art water quality treatment system that includes vegetated swales and vegetated strips, media filters in the coastal zone and outside the coastal zone up to Ortega Highway (approximately 12 miles), native vegetation, and design pollution prevention BMPs. **The result will be arguably the best roadway runoff water quality treatment system in the country, and the Commission's approval will raise the bar for future projects.**

The Staff Report attempts to dismiss this by saying that neither creek has been formally judged "impaired." This overlooks that in 2005, Heal the Bay gave San Onofre State Beach at San Mateo Creek an "F" grade in terms of water quality. More important, the benefits of these water quality improvements will be substantial and cannot be dismissed because, just as in the Commission's decision on the SR-56 project, the reduction in contaminants here will clearly enhance the use of downstream resources by both wildlife and humans. Although these two streams are not listed as impaired, this treatment system will enhance water quality within the coastal zone over existing baseline conditions, help ensure that this project will not contribute to any future designation of these watersheds as impaired, and will improve water quality for the species within the coastal zone that utilize San Mateo and San Onofre Creeks and the ocean near shore area. Importantly, **the project will result in a net benefit to water quality within the coastal zone, and specifically the Trestles surfing area.**

The project opponents also argue in their September 24, 2007 letter to the Commission that Caltrans would be required to install these improvements anyway. However, this is clearly not so, as discussed at length in Part E: Water Quality, above. **Caltrans has no strategy and no funding source identified or possible to make water quality improvements to I-5, other than the proposed project.**

Finally, the project provides several public safety benefits, including the provision of an alternate major evacuation route for the San Onofre Nuclear Generating Station (SONGS) and for local area residents, the public, and coastal recreation users during a wild fire or flooding by tsunami. Further, it provides enhanced fire protection benefits and increases accessibility for emergency vehicles. All of these are addressed directly by the policy in Section 30253 of the Coastal Act, which requires that new development "minimize risk to life and property in areas of high geologic, flood, and fire hazard."

The Staff Report addresses the emergency evacuation benefit associated with SONGS, which it downplays, despite the fact that SONGS, as well as the project, are located within a designated high fire hazard area (See California Department of Forestry and Fire Protection, FRAP Map for San Diego County dated 9/25/07), and despite the obvious and uncontested fact that weekday traffic, which is already congested, will increase by 60% in 2025, and weekend traffic is projected to be even higher. As to SONGS emergency access, it defies common sense to state that there is no problem when it is obvious that traffic generation of that sort would cause both chaos and gridlock, without the alternative access that this project would provide. Currently, should an emergency evacuation of SONGS be required, it is anticipated to take vehicles 9 ½ hours to completely vacate the 10-mile radius from SONGS. An incident on I-5 could increase evacuation time by nearly two hours, and an earthquake could increase evacuation to up to 18 hours². Southern California Edison's (SCE) evacuation time evaluation report concludes, "*Evacuation time is a function of available roadway capacity.*"³ The importance of maintaining I-5 as accessible as possible has not escaped the Commission. As the Commission itself stated in approving Caltrans' project requiring construction within San Mateo Creek to stabilize the I-5 freeway bridge piers (Appl. No. 6-01-149):

" . . . I-5 is a major coastal access route and provides the major vehicular access into San Diego County from the north. Disruption of service on I-5 would have a significant impact on coastal access."

Section 30253 requires the Commission to minimize risks to life and property in areas of high flood and fire hazard. In their September 24, 2007 and January 17, 2008 letters, the project opponents assert incorrectly that Section 30253 requires that coastal projects be designed "to minimize their own safety risks." This misreads the coastal policy, which requires that new development "minimize risks to life and property" in high hazard areas, which FTC-S clearly does. As noted, the project would be located in a high fire hazard area, and would provide enhanced fire protection benefits that are not presently available, as well an additional evacuation route in the case of flooding by tsunami. The Staff Report simply ignores these additional emergency access and evacuation benefits, despite the provisions of Section 30253. In short, the impacts on coastal

² Wilbur Smith Associates. "Evacuation Time Evaluation for the San Onofre Nuclear Generating Station" (2007). Prepared for SCE.

³ Ibid.

resources from not constructing the project would be more significant and adverse than the project's ESHA and wetland impacts.

Consistent with numerous past actions of the Commission that have approved transportation projects like this one, FTC-S is, on balance, most protective of coastal resources. The Commission can and should apply the "balancing" provision in Section 30007.5 here in approving TCA's consistency certification⁴.

B. Commission Staff Guidance in the Wake of the *Bolsa Chica* Decision

Equally instructive is the Commission staff's guidance on the Commission's approach to "balancing" following the Court of Appeal decision in *Bolsa Chica Land Trust v. California Coastal Com.* (1999) 71 Cal.App.4th 493, and while the State Route 56 application, discussed above, was pending. That guidance -- that the Commission has the discretion to apply the "balancing" provision in reviewing major transportation projects -- ultimately resulted in the Commission's approval of the middle segment of State Route 56, as discussed above.

On November 18, 1999, Assemblywoman Denise Ducheny, along with Assemblywoman (now Orange County Supervisor) Patricia Bates, hosted a workshop on the "Impacts of Bolsa Chica Decision on Housing, Transportation and the Environment in San Diego County" (See Attachment 6, *Transcript, Roundtable Discussion on Impacts of Bolsa Chica Decision on Housing, Transportation and the Environment in San Diego County*, November 18, 1999). A diverse group attended the workshop, including representatives to explain the Commission's view, Executive Director Peter Douglas, former Chief Counsel Ralph Faust, and Supervising Deputy Attorney General Jamee Patterson.

On the issue of balancing, Mr. Douglas explained:

*". . . For example, as Bill [Boyd] said, that the decision seems to suggest that anything that isn't specifically permitted in the Coastal Act in a wetland can't be permitted. **That's simply not true.** The Commission has dealt with situations like this in the last few months, last six months. For example, in the Eel River Delta dealing with a barn that would take cows out of wetlands and as a*

result improve water quality, the Commission approved that barn even though it's not a specifically permitted use in a wetland because it found that there was a specific conflict, a direct conflict, between the policy that protects wetlands and the policy that calls for the protection of water quality and endangered species.

The [Bolsa Chica] court said that when you have a direct conflict between specific policies like that, the Commission can balance and come out with a result that is on balance most environmentally protective. It also did that in a light rail case, again contrary to what some people think, here in San Diego which was an expansion of transportation capacity. It was a light rail project in San Diego that required the placement of piers in wetlands. The Commission found that, yes, that was contrary, that was not a permitted under this decision. But because it promoted public access, because it was mass transit, because it protected air quality, that there was a direct conflict between these policies and it made a decision which on balance was most protective of the environment and approved the project.

So, the Commission still has the discretion . . . and we've done that in other cases as well. **So the Commission still has the discretion to look at these specific cases on a case-by-case basis. We have not yet found a single case that we haven't been able to deal with and address because of the Bolsa Chica decision.** So I think it would really be ill-advised to use the Bolsa Chica decision as an excuse or a way to weaken the California Coastal Act . . ." (Pages 6-7; emphasis added.)

As to State Route 56, Mr. Douglas explained:

". . . We have one right now with I-56, for example, I think it's I-56, Route 56, where it is an expansion of capacity . . .

Right, and what we have told the proponents of the project, because it will go into environmentally-sensitive area, is that you

*have to build into the project some component, some beneficial component that promotes another specific Coastal Act policy. For example, promoting water quality. **So if you can show that you have in this project facilities or features built into it that promote or protect water quality, that will allow us to balance that particular benefit of this project against the policy of putting some fill into ESHA. We think that that allows the Commission to approve the expansion of this roadway.** And mind you this, again, is simply in the coastal zone in those areas where the Commission does have jurisdiction. **So we feel that we haven't found one yet that we haven't been able to deal with. It does mean that they have to build into their project some benefits that promote specific Coastal Act policy ...**" (Page 10; emphasis added.)*

On February 24, 2000, Assemblywoman Denise Ducheny (with co-authors Bates and Calderon) introduced AB 2310, which would have added, among other things, an additional allowable use to the 8 allowable uses in a wetland:

"(9) The expansion of existing transportation facilities or construction of new transportation facilities that further public access to, or along, the coast based on current or future needs. Projects that reduce, or otherwise address present or future demands on, coastal zone transportation facilities are consistent with this paragraph." (Emphasis added.)

On March 14, 2000, Commission Staff prepared a bill analysis for AB 2310. Among other things, the bill analysis explained:

***". . . The Commission currently has the ability to approve some transportation development in ESHAs, provided section 30007.5 is properly applied. AB 2310 would remove the Commission's current authority to require environmentally superior conditions on transportation projects."** (Page 3; emphasis added.)*

In a section discussing "Background," the bill analysis explained:

"After the Bolsa Chica court decision, the Commission determined not to take issue with that ruling and instead concluded that it could carry out Coastal Act requirements consistent with the decision by being careful to allow adverse impacts on ESHAs and wetlands only where a conflict between specific chapter 3 policies can be resolved in a manner that is, on balance, most protective of significant coastal resources." (Page 3.)

Finally, Staff recommended an "oppose" position on the bill, stating:

*"AB 2310 would significantly weaken the Coastal Act, putting coastal resources and the state's federal consistency review authority at risk. **The Coastal Commission currently has the discretion and the tools to approve reasonable development in the Coastal Zone using the existing balancing provision.**"*
(Page 4.)

Thereafter, AB 2310 was amended by the authors to delete paragraph (9), above, relating to transportation as an allowable use, although other new provisions relating to balancing remained.

State Route 56 was then approved at the Commission's May 14-17, 2000 hearing, based on balancing in favor of the public access and water quality policies of the Coastal Act.

On May 18, 2000, AB 2310 was amended to delete the additional language relating to balancing, leaving in place the traditional balancing provision in Section 30007.5.

The foregoing discussion, coupled with the past Commission's decisions, demonstrates that the Commission, in the exercise of its discretion, has employed a consistent approach to approving major transportation projects, like FTC-S, through application of the "balancing" provision in Section 30007.5.

II. ATTACHMENTS

1. California Coastal Commission, Revised Findings for State Route 73, CC-63-92 and 5-92-232 (TCA), adopted May 13, 1993
2. California Coastal Commission, Findings for State Route 56, 6-98-127 (City of San Diego), adopted May 10, 2000
3. California Coastal Commission, Findings for Double Tracking Project, CC-004-05 (North County Transit District), adopted November 16, 2005
4. California Coastal Commission, Findings for Passing Track Extension and Bridges, CC-008-07 (North County Transit District), adopted June 15, 2007
5. California Coastal Commission, Findings for Bridge Demolition and Construction, 4-97-216 (LACDPW), adopted April 12, 2007
6. Transcript, "Roundtable Discussion" on "Impacts of Bolsa Chica Decision on Housing, Transportation and the Environment in San Diego County, held November 18, 1999
7. Bill Analysis, California Coastal Commission, Assembly Bill 2310 (2000), dated February 29, 2000

ATTACHMENT 1

CALIFORNIA COASTAL COMMISSION, REVISED FINDINGS
FOR STATE ROUTE 73, CC-63-92 AND 5-92-232 (TCA),
ADOPTED MAY 13, 1993

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

W13a+b

PROPOSED FINDINGS

FILE - CLIENT NO. _____

COPY TO: _____ ON-COMBINED CONSISTENCY CERTIFICATIONAND COASTAL DEVELOPMENT PERMIT APPLICATION

Consistency Certification No.	CC-63-92
Application No.	5-92-232
Staff:	MPD-SF
Cons. Cert. File Date:	6/30/92
Permit Applic. File Date:	10/20/92
49th Day:	Waived
180th Day:	4/18/93
3 Months:	Extended
6 Months:	12/30/93
Commission Vote:	11/18/92
Hearing on Findings	3/17/93

APPLICANT: **Transportation Corridor Agencies (TCA)**

DEVELOPMENT
LOCATION:

Between existing Route 73 in the City of Newport Beach and the connection with Interstate 5 (I-5) in San Juan Capistrano, Orange County (Exhibits 1 and 2)

DEVELOPMENT
DESCRIPTION:

Construction of the San Joaquin Hills Transportation Corridor (SJHTC) (also referred to as "Corridor") (Exhibits 2-10)

PREVAILING
COMMISSIONERS:

Commissioners Calcagno, Cervantes, Doo, Malcolm, Moulton-Patterson, Neely, Rick, and Wright

SUBSTANTIVE FILE
DOCUMENTS:

See Page 56

EXECUTIVE SUMMARY:

On June 30, 1992, the applicant (TCA) submitted a combined coastal development permit and consistency certification for the construction of the San Joaquin Hills Transportation Corridor (SJHTC), a 17.5 mile tollway between existing State Route 73 in the City of Newport Beach and the connection with Interstate 5 (I-5) in San Juan Capistrano, Orange County. Two small components of this tollway are physically within the coastal zone: (1) approximately 2/3 of a mile in Newport Beach (the San Diego Creek bridge crossings, and two habitat

restoration programs)(Exhibit 6); and (2) approximately 1/2 mile around the middle of the tollway, located on Moro Ridge in unincorporated Orange County (Irvine Coast area) (Exhibit 2). The first of these two components requires a coastal development permit. The remainder of the 17.5 mile road is outside the coastal zone; however, it is federally permitted and affects the coastal zone, triggering the need for a consistency certification.

Because most of the project and its effects will occur outside the coastal zone, the Commission is limiting its review of habitat and water quality impacts to: wetlands losses within the coastal zone, downstream sedimentation/water quality impacts, and impacts on particularly sensitive habitat resources, such as rare, especially valuable, threatened or endangered species, where the geographic scope of the project's habitat impacts clearly extends into the coastal zone. Three critical issues are: (1) the question of whether the San Diego Creek crossing (within the coastal zone in Newport Beach) is consistent with the public access and wetland policies of the Coastal Act; (2) the impacts on the California gnatcatcher, a species proposed for listing as an endangered species; and (3) water quality monitoring issues.

Regarding the first of these issues, the project implements the public access policies of the Coastal Act, but is inconsistent with the uses identified as allowable for wetland fill purposes under Section 30233. However, the Coastal Act also contains a conflict resolution provision (Sections 30200 and 30007.5) that allows a conflict between two competing Coastal Act policies to be resolved in favor of that policy which on balance is the most protective of coastal resources. In this case, the Commission believes there is a conflict between wetland protection policies on the one hand, and the public access and recreation policies on the other. The public access and recreation policies encourage access to coastal access and recreation areas, and this project provides needed access to numerous such facilities. The Commission further believes that the wetland impacts associated with this project will not be significant in light of the fact that the project is the least damaging feasible alternative and adequate mitigation measures have been provided. In particular, TCA will mitigate project impacts on wetlands by creating new wetlands at a ratio of 4:1. Thus, pursuant to Sections 30200 and 30007.5 of the Coastal Act, the Commission finds that it is more protective of significant coastal resources to provide access to these facilities than to disallow approximately one third of an acre of wetland impact in this situation.

Regarding the second of these issues, the project would remove about 150+ acres of coastal sage scrub habitat, the habitat for the California gnatcatcher. However, of this habitat approximately 140 acres are outside the coastal zone. While TCA is still in the process of providing information and mitigation commitments on the California gnatcatcher to the Fish and Wildlife Service, pursuant to Section 7 of the federal Endangered Species Act conferencing provisions, TCA has further committed to mitigate this project's effects on the coastal zone by providing \$400,000 to be used to plant

additional gnatcatcher habitat in the project area. While the project is not consistent with Section 30240 due to its effects on gnatcatcher habitat, as the Commission found with respect to the wetland policies, with these commitments to mitigate the project's impacts on environmentally sensitive habitat in the coastal zone, the project is consistent with the Coastal Act pursuant to Sections 30200 and 30007.5. In making this determination the Commission finds that it is more protective of significant coastal resources to provide access to access and recreation facilities (see previous paragraph) than to disallow the gnatcatcher impacts in this situation.

Regarding the third of these issues, TCA has committed to aggressive mitigation measures to protect water quality (Exhibit 21), to collect baseline data, which is critical to determining post-construction compliance, and to submit its baseline water quality monitoring program to the Executive Director of the Commission for his review and approval. These measures include assurances that if the monitoring indicates adverse impacts are occurring, these will be remedied (see Addendum to Staff Recommendation, attached as Exhibit 27). These measures bring the project into conformance with the water quality provisions (Sections 30230, 30231 and 30412) of the Coastal Act.

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STAFF SUMMARY AND RECOMMENDATION:

I. STAFF SUMMARY

A. Project Description. The proposed San Joaquin Hills Transportation Corridor (SJHTC) project involves constructing the State Route (SR) 73 Freeway between the I-5 Freeway in the City of San Juan Capistrano to the existing terminus of SR-73 at Jamboree Road (Exhibits 1-6). The project is a 17.5 mile long tollway; this figure includes 14.5 miles of new location construction, 2.3 miles of widening on Interstate 5, and 0.7 mile of improvements on SR-73 between Jamboree and Birch. Portions of the proposed project are located within the cities of Newport Beach, Irvine, Laguna Beach, Laguna Niguel, Mission Viejo, San Juan Capistrano, and unincorporated areas of Orange County.

Within the coastal zone in Newport Beach, the SJHTC project consists of three principal components (see Exhibit 6): (1) approximately 2/3 mile of the highway itself, including three bridges over the existing San Diego Creek flood control channel and utility relocation work in the Bonita Creek area; (2) saltmarsh creation (Marsh Creation Program) adjacent to the intertidal segment of San Diego Creek, which will function, in part, as mitigation for wetland impacts of bridge construction; and (3) riparian habitat mitigation and enhancement in Bonita Creek (Bonita Creek Mitigation and Enhancement), which will function, again in part, as mitigation for riparian habitat impacts of highway work which will occur outside the coastal zone. Also within the coastal zone, in unincorporated Orange County 1/2 mile of the road enters and exits the coastal zone located near the middle of the SJHTC (Moro Ridge, Irvine Coast area - Exhibit 2).

The project consists of three general purpose lanes in each direction with auxiliary lanes and an 88 to 116 foot median to be used for construction of two High Occupancy Vehicle (HOV) lanes. The median can also accommodate a fixed guideway rail/transit system if such a system becomes feasible in the future. TCA has committed to construction of HOV lanes as early as feasible, but no later than the year 2010. The toll collection system is a closed barrier system, which includes one mainline barrier toll plaza near the center of the facility, and 12 ramp toll plazas located on six interchanges.

Graded widths of the SJHTC are up to 1300 ft. (Exhibit 9). Total grading for the project would be 40.5 million cu. yds. (Exhibit 10), the vast majority of which would be outside the coastal zone. Of that, 24.5 million cu. yds. would be cuts, and 16 million cu. yds. would be fill. A substantial amount of this grading has already taken place in the southern portion of the alignment (and outside the coastal zone). Grading for the roadbed in this area has occurred in conjunction with the Mission Viejo development in the Aliso Creek area. If the SJHTC is not built, this grading would be used by the Mission Viejo Co. to build a road serving the residential development in this area. Thus, of the 40.5 million proposed cu. yds., 12 million cu. yds. have already been graded (9 million cu. yds. of cut, and 3 million cu. yds. of fill). The remaining not yet graded amount would be 28.5 million cu. yds. of grading (15.5 million cut, 13 million fill).

Upon completion of construction, Caltrans will assume ownership and maintenance responsibility for the project. Caltrans is involved in the planning process to help ensure that the design and construction of the transportation corridors are in accordance with Caltrans' standards and specifications.

The estimated cost of the SJHTC is \$793 million.

B. Project Need/Objectives/History. TCA states:

The SJHTC has been a central component of a 14 year cooperative planning process incorporating regional land use, transportation and open space planning concerns. The SJHTC was adopted by the Orange County Board of Supervisors in August 1976, as part of the Orange County Master Plan of Arterial Highways.

The SJHTC was officially placed on the State Highway system in September of 1983, making it eligible for State and federal funding. Section 120 of the Federal Aid Highway Act of 1987 establishes a pilot program permitting federal participation in seven toll facilities, including a toll facility in Orange County, California. On October 12, 1987, the Orange County Transportation Commission designated the SJHTC as a pilot demonstration project authorized by the federal legislation. In December, 1987, the State of California passed legislation giving the Transportation Corridor Agencies of Orange County (TCA) the authority to construct the SJHTC as a toll facility.

The TCAs were established by joint power agreements among cities in Orange County and the County to cooperatively plan regional transportation facilities. There are two TCAs (Foothill/Eastern TCA and the San Joaquin Hills TCA) with separate boards consisting of elected officials. They are responsible for the planning, financing, designing and constructing of the corridors. The SJHTC governing Board is comprised of representatives from the cities of Costa Mesa, Dana Point, Irvine, Mission Viejo, Newport Beach, San Clemente, San Juan Capistrano, Laguna Niguel and Santa Ana and the County of Orange.

Present congestion problems in south Orange County create significant pressure on arterial highway systems located near or parallel to congested interstate freeways. Projected traffic conditions demonstrate significant increases of traffic on the existing circulation system. In many cases the existing levels of service on these highways and freeways are already at LOS F, forced flow conditions with operating speeds of less than 25 mph.

The primary objective of the SJHTC is to alleviate peak period traffic congestion on the regional circulation system and to minimize regional through traffic use of arterial highways. Additional objectives of the SJHTC are: to provide an alternative access route to the University of California, Irvine; and to relieve peak recreational traffic impacts on

SR-1, MacArthur Boulevard, and Laguna Canyon Road, thus providing additional access from inland areas to the coast and various open space and greenbelt areas.

Construction of the SJHTC would provide an alternative access route from and to the University of California, Irvine, for trips generated by academic functions, employment opportunities and special events. Implementation of the SJHTC would provide present and future traffic congestion relief to University and Campus Drives.

On a long-term basis, the SJHTC plays a central role in improving the function of PCH and several major arterial highways in providing access to recreational area located near and along the coast. PCH is a major arterial providing access to recreational uses in the coastal communities. Traffic volumes on PCH would be significantly reduced by implementation of the SJHTC.

Implementation of the SJHTC serves as a tool for obtaining the right-of-way for a future transit system. Without the SJHTC a new plan for obtaining transit right-of-way would have to be devised and implemented. The deletion of the SJHTC from the Orange County transportation system would also represent the loss of a critical link in the County's future high occupancy vehicle network.

The SJHTC is designed to meet existing and projected opening day (1995) traffic demands while preserving the median for other travel modes such as reversible lanes, HOV and light rail to meet future travel demand. The TCA has committed to the construction of HOV lanes in association with the overall SJHTC improvements as early as feasible, but in no event later than the year 2010. On September 5, 1991, the TCA entered into a Memorandum of Understanding (MOU) with the Southern California Association of Governments (SCAG) and the State of California Department of Transportation (Caltrans). ... The MOU sets forth the agency's agreement regarding implementation of a toll facility pricing policy. In summary, the MOU provides for the following relative to HOV lanes and vehicle occupancy on the SJHTC: 1) the use of a toll pricing mechanism as a interim measure in lieu of the construction of a HOV lane in the initial phase of the SJHTC project, 2) achievement of the same Average Vehicle Occupancy (AVO) rates during the interim period as would be attained by a HOV Lane, 3) establishment of an additional enforceable mechanism to insure that the toll facility pricing policy will be implemented, and 4) if AVO rates are not achieved, the MOU includes additional remedial actions.

C. Applicable Legal Authorities/Jurisdictional Issues. Section 307 of the Coastal Zone Management Act provides in part:

(c)(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state

shall provide in the application to the licensing or permitting agency a certification that the proposed activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

The informational requirements of the federal consistency regulations (15 CFR Part 930) provide that a consistency certification is to be submitted by the applicant for the federal license and should consist of the following:

Section 930.58 Necessary data and information.

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) A detailed description of the proposed activity and its associated facilities which is adequate to permit an assessment of their probable coastal zone effects. Maps, diagrams, technical data and other relevant material must be submitted when a written description alone will not adequately describe the proposal (a copy of the Federal application and all supporting material provided to the Federal agency should also be submitted to the State agency).

(2) Information required by the State agency pursuant to Section 930.56(b).

(3) A brief assessment relating the probable coastal zone effects of the proposal and its associated facilities to the relevant elements of the management program.

(4) A brief set of findings, derived from the assessment, indicating that the proposed activity (e.g., project siting and construction), its associated facilities (e.g., access road, support buildings), and their effects (e.g., air, water, waste discharges, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the applicant shall give appropriate weight to the various types of provisions within the management program. While applicants must be consistent with the enforceable, mandatory policies of the management program, they need only demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal zone effects for which the management program does not contain mandatory or recommended policies.

This project is a combined coastal development permit and consistency certification. The northernmost portion of the project is within the coastal zone in Newport Beach and requires a coastal development permit from the Commission. The City does not have a certified LCP and therefore has not begun issuing coastal development permits. Except for one small portion of the project, most of the remainder of the 17.5 mile road is outside the

coastal zone. The portion of the project located within unincorporated Orange County within the coastal zone has received a County-issued coastal development permit. That permit was not appealed, and because it has not been reviewed by the Commission, it cannot substitute for Coastal Commission federal consistency. Under the CCMP, the Commission cannot delegate federal consistency authority to local government.

However, since it affects the coastal zone, and requires federal permits (Army Corps Section 404 permits), the entire project requires a consistency certification. For the portion inside the coastal zone in San Diego Creek, the consistency certification is redundant; the coastal development serves as a consistency certification. For the portion outside the coastal zone (i.e., the rest of the project), and the part in Moro Canyon within the coastal zone in unincorporated Orange County, TCA has submitted the consistency certification "under protest and without in any way waiving the TCA's right to contest CZMA consistency review authority outside the coastal zone under applicable law, for Corps 404 Permit activities located outside the coastal zone." This submittal was accompanied by numerous letters from TCA contesting the Commission's consistency jurisdiction over this portion of the project. TCA states:

This "consistency analysis" is being submitted for Section 404 Permit activities outside the coastal zone in an effort to cooperate with the Commission staff and to make clear that the staff's concerns have, in fact, been analyzed in the CEQA/NEPA review process, regardless of whether the Coastal Commission has CZMA consistency review jurisdiction for the U.S. Army Corps of Engineers (Corps) 404 permits for activities located outside the coastal zone. However, it shall be noted that the TCA does not, in any way, waive its right to contest the Coastal Commission's ability under applicable law to review the SJHTC Corps 404 permits for activities located outside the coastal zone. The TCA believes that specific provisions and legislative history of the California Coastal Act, the CZMA consistency review regulations and case law preclude the Commission from exerting CZMA consistency review authority over the aforesaid Corps 404 Permits, located inland of the coastal zone boundary. In support of these legal contentions, [we have submitted] ... letters ... dated June, 1992, ... and October 15, 1991 ...

Both the Office of Ocean and Coastal Resources Management (OCRM) and the Secretary of Commerce have responded to TCA's arguments contesting the Commission's consistency jurisdiction. OCRM and the Secretary confirm that the project is subject to federal consistency review. Included in TCA's assertions are arguments that the Commission is prohibited from reviewing development located landward of the coastal zone, even if it affects the coastal zone. On behalf of the Secretary of Commerce, in reviewing TCA's assertions, NOAA states:

The 1990 CZMA reauthorization clearly establishes in CZMA section 307(c)(3) (a) a state's right to review federal license or permit activities, in or outside a state's coastal zone, that affect any land or water use or natural resource of the coastal zone.

Furthermore, I concur with the State that the activities at issue are likely to affect the coastal zone.

The full text of these letters is contained in Appendix A. That appendix contains TCA's letters questioning the Commission's consistency authority, the Commission staff's written responses, and the Commerce Secretary and OCRM letters regarding jurisdictional questions. TCA does not contest the Commission's coastal development permit authority regarding the San Diego Creek crossings in Newport Beach within the coastal zone.

More specific jurisdictional issues are discussed in the Water Quality section of this report (pages 46-47), and in the following discussion of the relevance of Section 30169 of the Coastal Act.

D. Section 30169. Aside from overall jurisdictional issues discussed in the previous section and in Appendix A, TCA has asserted that the provisions of Section 30169 further limit the scope of the Commission's review. TCA states:

One other area to be served by the SJHTC is the subject of special direction of the Legislature set forth in Section 30169(g) of the Coastal Act. In resolving a dispute regarding the coastal zone boundary in the Aliso Viejo area of Orange County, special provisions for runoff management and affordable housing were provided for in Sections 30169(d) and (f) of the Coastal Act. In return for these public benefits, the Legislature enacted the following statutory directives:

Notwithstanding any other provision of law, the application of this division by the Commission to the development or use of any infrastructure necessary and appropriate to serve development within the portions of the Aliso Viejo planned community located inland of the coastal zone as amended by this section ... [shall be strictly limited to addressing direct impacts on coastal zone resources and] shall be carried out in a manner that assures that the infrastructure will be provided ... For purposes of this subdivision, "infrastructure" means those facilities and improvements necessary and appropriate to construct urban communities, including ... streets, roads, and highways; (Coastal Act Section 30169(g)

TCA goes on to state that:

The SJHTC is identified in the Final EIR for the Aliso Viejo Planned Community as a major infrastructure facility required to serve the build out of Aliso Viejo. Likewise, the SJHTC is identified in the Orange County Master Plan of Arterial Highways (MPAH) as a necessary and appropriate transportation facility required to serve both Aliso Viejo and southern Orange County residential areas including the previously discussed coastal zone areas of central and southern Orange County (please refer to the Section 4(f) Analysis in the FEIS, for a detailed description of the joint planning history of the Corridor). Thus, in serving the Aliso Viejo planned community, the SJHTC is serving an area specifically

identified, and legislatively mandated in Coastal Act Section 30169(g), as "development...permitted consistent with the provisions of this division" under Section 30254.

Thus, TCA asserts that under 30169(g) (quoted in full in Exhibit 24), the Commission is mandated to authorize the SJHTC as "infrastructure necessary and appropriate to serve development within the portions of the Aliso Viejo Planned Community..." The Commission disagrees, and finds that the SJHTC project cannot be construed as infrastructure for the Aliso Viejo Planned Community. The applicant's FEIS clearly establishes this road as a major regional transportation corridor serving all of coastal Orange County. Exhibit 5, showing the Area of Benefit, and Exhibit 3, showing employment centers served, clearly establish the project to serve areas significantly larger than the Aliso Viejo Planned Community. Moreover, if the SJHTC is not constructed, the grading that has already occurred in the Aliso Viejo community that would have become the roadbed for the SJHTC will be transposed to become a roadbed for a local road that would constitute infrastructure for the Aliso Viejo community. Thus, the fact that this grading has already occurred meets the test of 30169 that infrastructure for this community be allowed to occur. The Commission therefore is not bound under the provisions of Section 30169 to authorize the SJHTC by virtue of its being considered "infrastructure necessary and appropriate to serve ...the Aliso Viejo Planned Community..."

E. Status of Local Coastal Program. The standard of review for the federal consistency certification in this case is the policies of Chapter 3 of the Coastal Act. If an LCP has been certified by the Commission and incorporated into the CCMP, it provides guidance in applying Chapter 3 policies in light of local circumstances. If the LCP has not been incorporated into the CCMP, it cannot be used to guide the Commission's decision, but it can be used as background information. In this situation, the City of Newport Beach's LCP has not been certified by the Commission. The County of Orange's LCP has been certified by the Commission, but has not been incorporated into the CCMP. Therefore neither of these LCPs can be relied upon to guide the Commission's decision for federal consistency purposes, although they can be used as background information.

In reviewing the coastal development permit, as with the consistency certification, Chapter 3 of the Coastal Act, and not the LCP, is the standard of review (because Newport Beach's LCP has not been certified). However the Commission must also analyze in reviewing the permit whether approval of the permit would prejudice LCP preparation for Newport Beach (see page 54-55 of this staff report for that analysis).

F. Applicant's Consistency Certification. TCA has certified that the proposed activity complies with California's approved coastal management program and will be conducted in a manner consistent with such program.

II. STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolutions:

A. Approval with Conditions

The Commission hereby approves a permit for the proposed coastal development permit for the portion of the SJHTC project in the coastal zone in Newport Beach (5-92-232), subject to the Standard Conditions (Exhibit 28) and Special Condition 1 below, on the grounds that, as conditioned, it would be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, would not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act (CEQA).

B. Concurrence

The Commission hereby concurs with the consistency certification (CC-63-92) made by the applicant for the entire proposed SJHTC, finding that the project is consistent with the enforceable policies of the California Coastal Management Program (CCMP).

C. Special Condition.

1. Gnatcatcher Habitat Mitigation. Prior to issuance of permit, and conforming to TCA's amended project description, TCA shall provide funding assurances to the satisfaction of the Executive Director that guarantee that \$400,000 will be deposited in an interest bearing account from toll revenues, payable to the Coastal Conservancy no later than one year after commencement of operation of the toll road. The funds will be used to improve gnatcatcher habitat in the project area. This requirement shall be above and beyond current TCA mitigation commitments.

III. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. PUBLIC ACCESS AND RECREATION

1. Coastal Act Policies. The Coastal Act provides:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or,

(3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Section 30212.5

Where appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

Section 30213

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Section 30252

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

Section 30254

New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division; provided, however, that it is the intent of the Legislature that State Highway Route 1 in rural areas of the coastal zone remain a scenic two-lane road. Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

TCA states that a major recreational access benefit of the SJHTC is that it would either provide direct access or significantly enhance access to the following recreational areas (see also Exhibit 4):

- o Newport Beach harbor and beach areas;
- o Corona del Mar beaches;
- o 16,000 acre Laguna Greenbelt regional open space:
 - Crystal Cove State Park
 - Buck Gully/Los Trancos Canyon regional open space
 - Laurel Canyon/Irvine Coast Wilderness Park
 - Laguna Canyon Ridge open space
 - Aliso Greenbelt at El Toro Road
 - Aliso/Wood Canyon Regional Park
- o Laguna Beach recreational areas;
- o Laguna Niguel Regional Park;
- o Aliso Creek State Beach and Salt Creek County Beach; and
- o Dana Point Harbor, Doheny State Park, Lantern Bay Regional Overlook.

TCA further states the project will provide:

Relief of long-term traffic demands on PCH, particularly as a result of:
a) a total increase in transportation system capacity on a parallel regional route, b) significantly increased recreational access capacity due to the counter flows of commute and recreational access capacity noted above, and c) providing alternative routes, parallel to PCH (e.g., Newport Coast Drive Pelican Hill Road interchange, access via Crown Valley Parkway and improved access to Dana Point.

Relief for major arterials providing access to the coast, both through the weekday counterflow factor and by new direct connections with the coast (e.g., the Newport Coast Drive [Pelican Hill Road] and Sand Canyon interchanges, improved access to the Dana Point area).

Providing recreational access to inland coastal greenbelt areas of the Irvine Coast, Laguna Canyon, Aliso Canyon and Wood Canyon, thereby both facilitating access from inland population centers and freeing transportation capacity on PCH that would otherwise be taken by recreational users accessing the greenbelt areas from PCH.

TCA therefore believes:

...the SJHTC is consistent with Section 30001.5, 30210, 30211 and 30212 because it will provide increased transportation/circulation capacity to facilitate regional recreational access for the [above] reasons.... These findings are consistent with several consistency reviews involving PCH widening projects, coastal roadway bridge projects, coastal roadway widening projects and the Devil's Slide bypass These findings are also consistent with the Pelican Hill Road findings of the Irvine Coast LCP and the SJHTC provisions of the Irvine Coast LCP

TCA further states that the SJHTC: (1) provides transportation facilities that help implement Section 30223; (2) provides transportation access to lower cost public recreational opportunities, thus furthering the goals of Section 30213 because of its pricing/HOV functions; (3) will carry out the provisions of Section 30252 for "facilitating the provision or extension of transit service" by providing for the most functionally and economically practicable form of transit, HOV carpool, vanpool and bus, while creating the physical infrastructure for future expansion to light or heavy rail systems in the median of the SJHTC should such systems become feasible; and (4) with respect to the distribution of facilities to avoid overcrowding or overuse by the public of any single area (Section 30212.5), facilitates access to a wide range of recreational use areas, both on the coast and immediately inland.

Finally, TCA states:

Thus, the No Project Alternative would result in either a significant overload of the transportation system capacity of Pacific Coast Highway or significant adverse impacts to coastal communities and public recreational areas necessitated by future widenings of PCH. The City of Laguna Beach has already stated its opposition to the latter and has articulated a "planned deficiency" approach to PCH through Laguna Beach (in findings of approval for the Irvine Coast Development Agreement EIR). Consequently, the failure to approve the SJHTC would result in impacts contrary to Sections 30001.5, 30210, 31212, 30212.5 30213, 30223, 30240, 30253.5 and 30254 of the Coastal Act either as a result of failing to provide for adequate transportation system access to coastal and upland support recreational areas or as a consequence of impelling the widening of PCH in a manner resulting in significant impacts both to coastal communities and to public recreational areas.

The Commission agrees with TCA's assertions, and finds: (1) that the project will not have any adverse effects on public access and recreation policies in the coastal zone; (2) that the claims made by TCA regarding the adverse

consequences of failure to construct the SJHTC would be traffic congestion and increased difficulty in achieving access to these important coastal recreational areas; and (3) the San Diego Creek crossing has been designed so that it will not interfere with the recreational trails that traverse beneath it. Therefore the Commission concludes that the project is consistent with, and necessary to implement, the public access and recreation policies of the Coastal Act.

B. ENVIRONMENTALLY SENSITIVE HABITAT

1. Coastal Act Policies

Sections 30230, 30233, 30240, and 30250 of the Coastal Act provide:

Section 30230

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30233

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

Section 30240

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Section 30107.5

"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Section 30250

(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.

The public access and recreation policies of the Coastal Act are quoted on page 12-14 (these are referred to in the conflict resolution discussion at the end of this wetland analysis).

2. Wetland Impacts

a. San Diego Creek

The loss of wetlands is a significant national issue. It is estimated that over 215 million acres of wetlands existed in the continental United States prior to the arrival of the first European settlers. Less than 95 million acres of wetlands exist today. This represents a loss of approximately 56% of the wetlands in the United States. Currently, wetlands are disappearing at a rate of 450,000 acres per year. Within the state of California, the loss of wetlands has also been significant. Over 90 percent of the wetlands, statewide, have been lost, and over 70 percent of the coastal wetlands no longer exist.

Historically, coastal estuaries and wetlands have been destroyed or disturbed by many human activities, including: dredging for ports and marinas; diking to remove from tidal influence; filling for the creation of new land for development; disposing of domestic sewage and industrial waste, and removing freshwater inflows. Of the original 197,000 acres of marshes, mudflat, bays, lagoons, sloughs, and estuaries in California (excluding San Francisco Bay), the natural productivity and open space values of 52 percent have been totally destroyed by dredging and filling. Of California's remaining estuaries and coastal wetlands, 62 percent have been subjected to severe damage and 19 percent have received moderate damage. Less than 10 percent of California's original coastal estuaries and wetlands remain relatively undisturbed.

Of California's remaining coastal wetlands, southern California wetlands have been the most severely degraded. However, southern California's coastal wetlands still support numerous birds, including endangered, migratory, and resident species. Several of the bird species that use southern California coastal wetlands are now threatened because of the massive losses of wetland habitat. Approximately 75 percent of the estuaries and coastal wetlands in southern California have been destroyed or severely altered by man since 1900. Two-thirds of the twenty-eight sizable estuaries existing in southern California at the turn of the century have been dredged or filled.

Since this project involves wetland fill in the coastal zone (as shown in Exhibits 11-14), it must be analyzed for consistency with Section 30233(a) of the Coastal Act. That Section identifies three tests that must be met before the Commission can authorize this project: an alternatives test; a mitigation test; and an allowable use test.

(i) Alternatives Test

TCA conducted extensive alternatives analyses, both in the FEIS and in its response to Commission staff comments. Along the same alignment as the proposed project, TCA analyzed two other "build" alternatives, called the "Demand Management Alternative" and the "Conventional Alternative." Both "build" alternatives would extend State Route 73 from Interstate 5 in San Juan Capistrano to Jamboree Road in Newport Beach, along a similar alignment as the proposed project. Other alternatives considered in the FEIS can be grouped into the following categories: Non-alignment Alternatives; Alignment Alternatives; Cross Section Alternatives; Interchange Alternatives; Mainline Toll Plaza Location Alternatives; and Wetlands Avoidance Alternatives. According to the FEIS, none of these alternatives represents a feasible less damaging alternative that would accomplish the project's objectives.

In addition, in response to Commission staff comments TCA has analyzed an alternative alignment which would result in deletion of the northern half of the SJHTC; the information presented by TCA confirms that that alternative would be more environmentally damaging than the proposed project.

In a more specific analysis regarding the design of the San Diego Creek crossings, TCA provided extensive documentation in response to Commission staff questions about whether the San Diego Creek wetlands impacts could be avoided through redesign of the bridges over San Diego Creek, with the goal of avoiding the location of pilings within the wetland area. TCA states:

Horizontal and vertical design in this area is ... [inhibited by a number of design] constraints. ... Due to constraints on bridge deck depth ..., existing highway facilities ..., vertical clearance over bike trails and storm flows, and ... foundational (soils and geotechnical) constraints ..., the maximum distance which can be clear spanned is 190 feet for the mainline bridges and 140 feet for the ramp bridge. The wetland area to be crossed by the north and southbound mainline bridges measures approximately 260 feet along the centerline, while the actual flood control facility measures approximately 335 feet across at the same location (390 feet including upper banks, levees and maintenance roads). Thus, in the case of the two mainline bridges, two piers for each bridge (for a total of four piers) must be sited within the mapped 260 foot wide wetland areas of the flood control facility. With respect to the ramp bridge, a combination of constraints requires that there be three bridge support structures. These constraints include such factors as the spans being set by the existing trail system, the fill for the bridge approach, and inability to spread the columns further apart or eliminate one because of bridge depth deck requirements.

Fundamentally, as bridges span greater lengths, the thickness of the superstructure must increase proportionally. As a rough rule of thumb, a bridge thickness (superstructure depth) might typically be five percent of the length that it must span. In the case of the ramp bridge crossing San Diego Creek, the width of channel that must be spanned is 360 feet and, applying the rule of thumb, the bridge must be approximately 18 feet thick and span the flood control channel. However, only an eight foot thick window exists between the constraints (flood elevation and interchange elevation). By providing intermediate supports, the effective span of the bridge is reduced and the thickness can be held within the constraint window of eight feet.

Additionally, the clay layer is saturated and problematic for the lateral strength needed for long span bridge construction.

Thus, apart from cost factors, a clear span structure is technically infeasible.

TCA has also submitted to the Commission staff additional supporting technical documentation as to the infeasibility of bridging the creek without sinking piles into the wetland area. The Commission's staff engineer has reviewed TCA's supplemental engineering information, and the Commission agrees that this alternative would be infeasible.

Finally, TCA has also analyzed how three of the seven piles could be further removed from the wetland, and TCA has indicated a willingness to construct the that alternative if so required by the Commission. However TCA believes it would be more damaging because it could increase flooding hazards, which could increase both adverse environmental as well as public safety risks. The Commission agrees with this analysis.

Conclusion. Based on the above analysis, the Commission concludes that the project could not feasibly be constructed across San Diego Creek without wetland fill, that TCA has incorporated all feasible measures to minimize wetland fill and wetland impacts, and that the SJHTC represents the least environmentally feasible alternative design capable of accomplishing the project's objectives. The Commission therefore finds the project meets the alternatives test of Section 30233.

(ii) Mitigation Test

Impacts. The San Diego Creek overcrossing will span the creek on bridges rather than at-grade; TCA notes that this minimizes the project's impacts to wildlife movement and wetlands along San Diego Creek to the extent possible, given the need for a San Diego Creek crossing. Nevertheless, to accomplish this seven bridge support structures will need to be situated within wetlands along San Diego Creek. Four of the bridge supports will be required for the two mainline bridges and will consist of twin bridge columns connected by a debris wall which extends 42 feet upstream. The remaining three bridge supports will carry the ramp bridge. The three ramp supports are single column designs with debris walls 28 feet in length. TCA states:

Permanent project impacts to environmentally sensitive habitat areas in the coastal zone are confined to the brackish marsh habitat in the bottom of the San Diego Creek flood control channel. Here, 0.33 acre of intertidal/brackish marsh area within and adjacent to the low flow channel of San Diego Creek will be displaced by bridge substructures or permanently lost due to loss of sunlight....

Thus, looking at permanent impacts, the bridge structures would result in the loss of 0.33 acre of wetland habitat (0.04 acre of structures and 0.29 acre equivalent of vegetation reduction [i.e., shading]). Exhibits 12-13 provide a breakdown of these impacts.

Regarding temporary impacts, project construction will result in the temporary disturbance of San Diego Creek wetlands consisting of 1.2 acres of brackish wetlands. TCA estimates the duration of the construction period for the two mainline bridges, which will be constructed simultaneously, to be 15 months. Construction for the third ramp bridge will take 11 months.

TCA discounts the value of the the habitat values being adversely affected, stating:

In summary, it can be concluded that the existing wetland is so severely degraded and its natural processes are so substantially impaired that it is not capable of recovering and maintaining a high level of biological productivity without major restoration activities. While the proposed project does not further degrade the existing conditions, the proposed mitigation, i.e. wetlands creation adjacent to the existing channel, will certainly serve to restore some of the system's former values.

While the Commission does not agree as to the lack of value of the San Diego Creek wetlands, and notes their importance as bird foraging habitat and a vital wildlife link between two adjacent wetland systems, the Commission notes that TCA has committed to a wetland mitigation program to mitigate the project's impacts.

Mitigation. All wetland areas temporarily disturbed during project construction will be restored to their existing or better condition prior to project completion. Restoration work, which will commence immediately upon completion of bridge construction, will be conducted in accordance with the design, performance standards, maintenance requirements and monitoring program set forth in detail in TCA's "Habitat Restoration Plan for Temporary Construction Impacts in San Diego Creek Flood Control Channel."

Mitigation for the permanent wetland losses in San Diego Creek are described in detail in TCA's "Marsh Creation Program" revised September 8, 1992, and will consist of the creation of a tidally influenced marsh area adjacent to San Diego Creek near its mouth at Upper Newport Bay (Exhibit 14). At this location TCA proposes a 4.3 acre marsh creation project, with water to be supplied by two 36" culverts, designed to function with the same tidal influence as the rest of San Diego Creek. Habitat proposed would be an

intertidal pickleweed marsh, with a baccharis/saltbush slope surrounding the marsh. Pickleweed and other plants endemic to upper Newport Bay will be planted, and the slope will be planted with Emory baccharis, mulefat and Brewer's saltbush. Adequate wetland buffers will be provided; there is currently no development other than Jamboree Rd. immediately surrounding the site, and scrub area immediately adjacent to the marsh would further buffer the wetland. The open space to the north (14.7) is currently designated open space and public facilities, such as a fire station and park and ride facility, which, if proposed, can be designed to maintain adequate buffers.

The only problem currently identified by the Commission staff regarding this site is the fact that a future transition ramp between Jamboree Rd. and State Route 73 would pass over the edge of the marsh site (Exhibit 14), and pilings supporting this ramp may need to be placed within the proposed marsh. Additional shading impacts would also adversely affect the marsh. However this ramp has now been excluded from the project; TCA states it would not be needed for five years. TCA also states that it has subtracted from its calculation of wetland created to mitigate SJHTC impacts any marsh and/or buffer that would underlie this proposed ramp. Therefore its calculation of a 4:1 ratio of mitigation to project impacts does not include any area that would be located underneath this ramp.

Thus, the net area of wetlands to be created, exclusive of the area reserved for the future ramp and the buffer, is 2.4 acres. TCA will mitigate the 0.33 acre permanent impact at a 4:1 ratio. This translates to a mitigation requirement of 1.32 acres. That area of the wetlands portion of the Marsh Creation site will be credited to mitigate SJHTC wetland impacts. The remaining 1.08 acres of wetlands within the Marsh Creation site will be reserved, or "banked" as mitigation credits available for future use.

Implementation and Monitoring. Regarding implementation for the Marsh Creation Program, TCA states that marsh creation will occur concurrently with the beginning of construction for the SJHTC, with planting to begin as soon as the design elevations are reached. Final grading plans, will be prepared, soils analysis (and if necessary, soils amendments) will occur after grading. Subsequently, soil preparation and weed control will be performed, and planting and irrigation will occur. Weed control of invasive species will be provided.

Regarding monitoring of temporary construction impacts, TCA proposes a 5 year monitoring program, conducted by a qualified biologist: monitoring for maintenance (e.g. weed control) at 1, 3, 6 and 12 months, and semi-annual monitoring thereafter until performance standards are met; and monitoring of performance standards at 3 and 12 months following planting, with annual monitoring for at least 5 years. TCA has committed to supplemental monitoring beyond the 5 year period if the habitat has not been adequately established, as well as remediation should any problems arise. The performance standards have not yet been fully developed; however TCA has committed that: "The performance standards shall be submitted to the Corps, USFWS, CDFG and CCC prior to construction." TCA also states that this mitigation program for the

construction impacts will be subject to review and approval by the Commission. All annual reports will be submitted to the Commission. Finally, TCA states: "If performance standards cannot be achieved due to adverse soil or other unmanageable site conditions, an alternative ...mitigation plan may be submitted to the ... CCC for approval."

Regarding monitoring of permanent impacts mitigation (the Marsh Creation Program) TCA will monitor for 5 years, with monitoring reports timed the same as for construction impacts. Additional monitoring beyond 5 years, as well as any corrective action needed identified during the monitoring, will be assured by TCA. The monitoring will assure success of the hydrological regime, 75% coverage by desired species after 5 years and projected 95% coverage after 10 years, by self-sustaining vegetation. Monitoring will also look at benthic and aquatic vertebrate abundance, as well as bird use. Remedial measures will be undertaken if performance standards are not met, and final marsh creation construction documents will be submitted to the Executive Director of the Commission for review and approval prior to commencement of construction of the SJHTC San Diego Creek crossing. All annual monitoring reports will be submitted to the Commission, and the final annual report will contain recommendations for continued maintenance and monitoring. TCA states that final plans to ensure proper functioning of the culverts in perpetuity will be submitted to the Commission. TCA states that provisions for permanent maintenance, monitoring and remediation, including funding:

... will be developed during the finalization of the Marsh Creation Program through the Corps 404 and CDFG 1601 permit process. Additionally, TCA is anticipating assuring the permanent protection of the wetlands areas by dedicating an open space or conservation easement to CDFG. These easements will provide for the permanent protection and reservation of these areas as wetlands.

TCA further states that the site monitor will prepare a minimum of five annual reports, to will be filed with the Corps, USFWS, CDFG and the Coastal Commission. The reports will document the following information:

- o Recommended corrective measures (if any), the goals of any such measures, and appropriate timing for implementation.
- o Complete descriptions of any corrective measures taken in the previous year and an assessment of the success of any such measures, including the basis for this judgment.
- o Progress of the mitigation plantings toward achieving the specific performance standard set for each mitigation area.

These performance reports will include specific evidence regarding each area's progress toward achieving the performance standards concerning: percentage cover of desired species; general development of habitats; and tidal regime. Finally, TCA states:

In addition to these concerns, the final annual report will contain the site monitor's recommendations or the continued maintenance and monitoring of the culvert(s). This recommendation will be based on the findings made during the initial five year maintenance/monitoring program. Final plans to ensure proper functioning of the culverts in perpetuity will be prepared by TCA and approved by the Corps (with advice from USFWS), CDFG and the Executive Director of the California Coastal Commission. Implementation of such plans will be TCA's responsibility.

TCA points out that because San Diego Creek is used for flood control, TCA is unable to guarantee that the restored areas will be preserved in perpetuity. TCA states: "The circumstances under which vegetation may be lost will be described in the performance standards to be developed. Nevertheless TCA will maintain a construction easement through the maintenance and monitoring period."

Financing and Ownership. Regarding financing of mitigation for the construction impacts, TCA has committed to funding through the 5 year period, or "until such time that the performance standards have been met." Regarding financing and ownership of Marsh Creation mitigation (permanent impacts), TCA states that the provisions for permanent maintenance, monitoring, remediation funding, ownership and maintenance of wetland values will be developed during the finalization of the Marsh Creation Program through the Corps 404 and CDFG 1601 permit process. TCA states it will fund the monitoring and maintenance of the wetland mitigation areas for an estimated period of five years, or until such time that the performance standards have been met. Additionally, TCA anticipates assuring the permanent protection of the wetland areas by dedicating an open space or conservation easement to CDFG. These easements will provide for the permanent protection and reservation of these areas as wetlands.

Conclusion. The Commission has reviewed TCA's Marsh Creation Program and agrees that (1) the 4:1 ratio for permanent impacts and 1:1 ratio for temporary impacts is adequate and consistent with past Commission requirements; (2) that the Marsh Creation Program is sufficiently detailed, and provides sufficient mechanisms for Commission (Executive Director) review of final plans and measures, to enable a determination that it would provide suitable replacement habitat; and (3) that the monitoring committed to and definitions of success are adequate for the five year period agreed to by TCA.

The Commission staff has identified one concern to TCA, which is that no provision has been made to assure permanent monitoring and remediation efforts for the life of the SJHTC project (i.e., beyond the 5 year period). TCA has responded by agreeing to further commitments for long term mitigation of the marsh, stating: "TCA will assume maintenance, monitoring and remediation activities related to the marsh mitigation site for the life of the SJHTC." The language agreed to between TCA and the Commission staff allows for TCA to seek an amendment if the Dept. Fish and Game determines that long term monitoring and mitigation are no longer necessary.

With these additional commitments, the Commission finds that TCA has provided sufficient information and commitments to enable the Commission to be assured that the project's adverse impacts on wetlands in San Diego Creek will be mitigated in accordance with the mitigation test of Section 30233.

(iii) Allowable Use Test

Section 30233(a) prohibits the Commission from authorizing a wetland fill project under this section unless it meets the "allowable use" test. To meet this test the activity must fit into one of eight categories of uses permitted for wetland fill enumerated in Sections 30233(a) (1)-(8). Roads are not mentioned in any of the eight categories. To provide further guidance in implementing these sections the Commission also has adopted Statewide Interpretive Guidelines on Wetlands (Wetlands and Other Wet Environmentally Sensitive Habitat Areas, adopted February 4, 1981¹ - Section IV(A)(5)), in which the Commission did mention roads in the context of a discussion of the incidental public purposes that might be allowed under Section 30233(a)(5). Specifically, the Guidelines explained incidental as:

Incidental public service purposes which temporarily impact the the resources of the area, which include, but are not limited to, burying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines (roads do not qualify)³ (emphasis added)

The footnote (footnote 3) elaborating on the limited situations where the Commission would consider a road as an exception to this policy states:

When no other alternatives exists, and when consistent with the other provisions of this section, limited expansion of roadbeds and bridges necessary to maintain existing traffic capacity may be permitted. (emphasis added)

¹ Adopted pursuant to Section 30620(a) & (b) of the Coastal Act, which state in relevant part:

The Commission may, ... from time to time ... adopt ... permanent procedures or guidelines for the ... review ... of coastal development permit applications ... as it determines to be necessary to better carry out this division.... Such procedures shall include

(3) Interpretive guidelines designed to assist local governments, the commission, and persons subject to this chapter in determining how the policies of this division shall be applied in the coastal zone prior to certification of local coastal programs;

TCA states in its consistency certification that the project is consistent with Section 30233 and the Coastal Act for three reasons:

- a. The corridor crossing of San Diego Creek is a bridge, not a highway fill or road through a wetland. By definition, a bridge in this location is a coastal dependent use.

The only structural fill that will be placed in the San Diego Creek channel is two sets of piers for each span. The support structures will displace [0.04] acre of surface wetlands. [Exhibits 12-13] illustrates the wetlands impacted by the San Diego Creek over-crossing.

- b. The Coastal Act specifically allows for incidental public services within wetland areas (Section 30233(a)(5)).
- c. The California Coastal Commission has previously approved similar facilities in wetlands. Examples of this are:

Irvine Coast LCP: allowed inclusion in LCP/construction of Pelican Hill Road and Sand Canyon Avenue in "Environmentally Sensitive Habitat" Category "A" areas that include riparian habitat.

LCP, Phase II: Land Use Plan (LUP) for Marina Del Rey/Ballona, prepared by the Los Angeles County Department of Regional Planning, identified and received approval for the construction of Falmouth Avenue over Ballona Wetland.

Bolsa Chica LCP: allowed Cross Gap Road corridor through wetland area (shown as alternatives adopted by the California Coastal Commission in November, 1984, and January, 1986).

Devil's Slide Bypass, San Mateo County: Commission adopted findings of consistency certification (No. CC-45-85) of Devil's Slide bypass. Project included bridges in four locations to span creeks, with impacts to riparian habitat.

State Route 76, San Diego County: Commission adopted findings of consistency certification (No. CC-41-89) of bypass of State Route 76. Caltrans proposed to construct the bypass within a riparian wetland. Impacts would be mitigated by avoiding some of the riparian areas, minimizing the indirect effects to the least Bell's vireo and replacing the unavoidable habitat losses. Specific findings were made allowing wetland impacts under Section 30233 of the Coastal Act.

San Luis Obispo, railroad bridge crossing: Secretary of Commerce, in overriding a Coastal Commission denial of a consistency determination for a Corps 404 permit, determined that fill for a bridge in a wetlands is consistent with the objectives of the CZMA (Federal Register, Vol. 50, No. 199 - October 15, 1985 - Notices).

TCA elaborates:

Additional examples of bridges involving fill approval in the general vicinity of the project pursuant to the Coastal Act include the shift in location and widening of the Pacific Coast Highway bridge over Newport Bay and the present MacArthur bridge over San Diego Creek. Several additional consistency review actions by the Coastal Commission also constitute precedents for considering bridge pilings to be an allowable use under the Coastal Act.

TCA concludes in its consistency certification:

As the aforementioned discussion ... of LCPs, CDPs and CZMA reviews indicates, the Coastal Commission has at times reviewed bridges proposed to be located in riparian wetland areas under Section 30240, and at other times under Section 30233 The Commission has also considered bridges and roads proposed to be located in wetland areas under Section 30411 as parts of wetland restoration projects That analysis of previous CCC decisions in similar cases clearly demonstrates that:

Bridges in directly analogous circumstances have been considered to be coastal dependent uses, and thus allowable under Section 30233, 30240 and 30232;

Bridges in directly analogous circumstances have been considered to be incidental public services and thus allowable under Sections 30233, 30240 and 30232;

Bridges in directly analogous circumstances have been considered to be integral aspects of wetland restoration projects, and thus allowable under Sections 30233/30411.

With regard to the Newport Beach LUP, the LUP approved by the Commission provides guidance as follows regarding uses in environmentally sensitive areas in San Diego Creek:

Policies 1 and 2 above [sensitive areas policies] are not intended to [prevent maintenance activities]... nor are they intended to prohibit public infrastructure when the environmental process demonstrates that adverse impacts can be mitigated, or that the benefits outweigh the adverse impacts (Newport Beach LUP, p. 21).

For the foregoing reasons, the San Diego Creek/Coastal Zone Segment of the SJHTC is an allowable use under Sections 30233, 30411, 30240, and 30223 of the Coastal Act.

The Commission disagrees with many of these statements and most of the reasoning in TCA's consistency certification concerning allowable uses. For instance, TCA's first contention is misplaced because this road is not a "coastal-dependant use." Section 30101 defines "coastal-dependant development or use" as any development or use which requires a site on, or adjacent to, the sea to be able to function at all. Uses that fall within this definition include boating or fishing facilities, uses that have a functional relationship to the sea and, incidentally, also are included in the allowable use provisions of Section 30233. Roads, on the other hand, even roads with bridges, do not have this functional relationship with the sea and are not coastal dependant.

Similarly, even though the project incurs permanent impacts to only one third of an acre of wetland for road purposes, it is not consistent with the provisions for incidental public service uses in Section 30233(a)(5) and the related wetlands guidelines. As the Commission has stated previously in the guidelines, road construction is not considered to be an incidental public service purpose except in limited situations where the mere expansion of an existing roadbed or bridge is required to maintain existing travel levels and no other alternative exists. Additionally, the project's impact on wetlands, while very limited in area, will be permanent and the guidelines demonstrate that incidental public service uses are only permissible under Section 30233(a)(5) where they will have temporary impacts.

With regard to TCA's contention that the Commission has approved other road facilities, the Commission notes that none of these projects involved identical situations. For instance, the Ballona and Bolsa Chica road approvals actually involved LCP actions. Moreover, each proposed road project involved road construction as part of a restoration program for degraded wetlands. (These projects were permissible under a combination of Section 30233 and 30411.) (A more detailed discussion of these previous projects is contained in the staff report for the Commission meeting of 11/18/92.) In short, none of the reasons offered by TCA for finding this project consistent with the allowable use provisions of Section 30233 are persuasive.

(iv) Resolving Conflicts Among Competing Coastal Act Policies

Nevertheless, the number of road projects identified by TCA is indicative of the fact that the Commission has often been confronted with situations where it has been asked to reconcile the public's need for safe and viable public access to the coastline with other Chapter 3 policies on resource protection. Simply put, road projects are frequently point-to-point projects that do not inherently possess the same flexibility, at least in terms of route, that other projects have. As a result, the Commission has been asked to approve road projects which pass through or near sensitive resource areas such as wetlands and environmentally sensitive habitat areas. In these situations the Commission also has been asked to consider that these projects often serve the principal (and frequently competing) policies of the Coastal Act promoting access to the coast.

The present project presents such a conflict between the public access provisions of the Coastal Act and the resource protection provisions. TCA contends that implementation of the public access provisions of the Act will be thwarted if the project is not constructed. TCA States:

Thus, the No Project Alternative would result in either a significant overload of the transportation system capacity of Pacific Coast Highway or significant adverse impacts to coastal communities and public recreational areas necessitated by future widenings of PCH. The City of Laguna Beach has already stated its opposition to the latter and has articulated a "planned deficiency" approach to PCH through Laguna Beach (in findings of approval for the Irvine Coast Development Agreement EIR). Consequently, the failure to approve the SJHTC would result in impacts contrary to Sections 30001.5, 30210, 31212, 30212.5 30213, 30223, 30240, 30253.5 and 30254 of the Coastal Act either as a result of failing to provide for adequate transportation system access to coastal and upland support recreational areas or as a consequence of impelling the widening of PCH in a manner resulting in significant impacts both to coastal communities and to public recreational areas.

The Coastal Act envisions situations such as this where there may be a conflict between conflicting Chapter 3 policies and provides specific guidance on how these conflicts should be resolved. Section 30007.5 states:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

Echoing the concern about such conflicts, Section 30200(b), the first section in Chapter 3, the chapter containing the substantive policies of the Act, declares:

(b) Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

The Commission agrees with TCA that this project presents a conflict between competing policies of the Act that requires resolution in conformity with the provisions of Sections 30007.5 and 30200. As determined by the Commission above, this project will promote public access and recreation along the coast,

*[Wetland pressures
to widen path of
avoid other impacts]*

as well as implement the public access and recreation along the coast, as well as implement the public access and recreation policies of Sections 30210, 30211, 30212, 30212.5, 30213, 30252 and 30254 of the Coastal Act. These benefits will be lost if the project is not approved. Balanced against these beneficial aspects of the project is the competing fact that the project also will fill .33 acres of wetland for a use that is not allowed by Section 30233. The reality of the situation, however, is that even the impacts of this fill will be mitigated by a wetland replacement program that will replace this lost wetland area at a 4:1 ratio. The Commission also notes that the placement of this fill is the least damaging feasible alternative.

For these reasons the Commission finds, pursuant to Sections 30007.5 and 30200 of the Coastal Act, that on balance it is more protective of coastal resources to resolve this conflict by approving the project and allowing the proposed wetland fill. Not only will this project provide access to the recreational facilities in the project vicinity in accordance with the public access policies of the Act, it also will provide replacement wetland acreage at a 4:1 ratio to mitigate for the fill of .33 of an acre of wetland. Conversely, disallowing this project to preserve this one third of an acre of wetland is not necessary to protect coastal resources in this situation and more significantly would defeat implementation of the public access and recreation policies of the Coastal Act. The Commission therefore finds the project consistent with the Coastal Act in reliance on the conflict resolution provisions of Section 30007.5 and 30200.

b. Bonita Creek

The Bonita Creek Enhancement Project is a riparian enhancement project located predominantly outside the coastal zone. It is intended to mitigate riparian habitat impacts of the SJHTC project and, over and above mitigation requirements, provide riparian habitat enhancement. Of the 22.6 acre project, only 0.6 acres would be located within the coastal zone. Bonita Creek was substantially disturbed by the construction of Newport Coast Drive (a.k.a. Pelican Hill Rd.), which resulted in the grading and channelization of 3,900 ft. of Bonita Creek, as well as other wetlands where Bonita and Coyote Creeks converge (outside the zone). The SJHTC would result in further habitat losses of what remains of Bonita Creek downstream of the Bonita Creek reservoir. The purpose of the Enhancement project is to restore riparian values to the extent feasible to the riparian system, including adverse impacts from portions of the SJHTC that are located outside the coastal zone, and improve wildlife movement between San Diego Creek, which is within the coastal zone, and natural areas upstream outside the coastal zone. The SJHTC will not remove riparian habitat inside the coastal zone along Bonita Creek; however it will remove existing riparian habitat immediately outside the coastal zone. Within the coastal zone itself, the SJHTC will require the temporary disturbance of 6,200 sq. ft. of riparian habitat due to the need for utility relocation; this area will be restored upon completion of construction. TCA states:

Freshwater riparian habitat within Bonita Creek which will be temporarily disturbed for 12 to 18 months due to utility relocation work will likewise be restored immediately upon completion of work in accordance with the design, performance standards, maintenance requirements and monitoring program prepared for the "Bonita Creek Mitigation and Enhancement Program."

Furthermore, even though it will be an engineered riparian habitat system, with armorflex in the creek bottom in the downstream portions of the creek, overall the Bonita Creek Enhancement Project will result in a net habitat benefit for the coastal zone, when compared with its relatively minor adverse impacts on the coastal zone, due to the wildlife movement potential in the restored riparian corridor. TCA states that when combined with other planned and existing open space connections, this channel will be a key part of a system that provides a connection between San Diego Creek/Upper Newport Bay and the open spaces of the San Joaquin Hills (Exhibit 19).

The Bonita Creek Enhancement Project provides that the slopes adjacent to the reconstructed creek will be planted with coastal sage. The system will be designed to accommodate high volume flood flows by use of diversion structures to redirect high volume flows. The creek itself will be planted with willow woodland forest, cotton/willow forest, sycamore/elderberry forest, and mulefat scrub, in an effort to create habitat for the least Bell's vireo, yellow-breasted chat, and other birds, as well as coyotes. TCA has provided commitments for implementation and monitoring to the Commission and the wildlife agencies to assure that the enhancement project will be successful and that if any remediation measures are needed they will be performed.

The Commission finds that the Bonita Creek Enhancement Project is consistent with Sections 30233 and 30240 because, to the extent it is located within or affects the coastal zone, it constitutes an allowable use under Section 30233(a)(7) as a restoration project, it constitutes an allowable use under Section 30240 as a use dependent on the environmentally sensitive habitat resources and is compatible with the continuance of such habitat, and it would not result in any adverse impacts on such habitat within the coastal zone and in fact would benefit environmentally sensitive habitat within the coastal zone. The Commission therefore finds the Bonita Creek Enhancement element of the project consistent with the habitat protection policies of the Coastal Act.

c. Non-Wetland ESHA Impacts

This section is divided into three parts: (i) listed threatened/endangered species; (ii) species proposed for listing; and (iii) more generic wildlife issues.

(i) Least Bell's Vireo

The least Bell's vireo is an important coastal species, as well as both a state and federally listed endangered species. The major concern over this species is the riparian woodland habitat in the Bonita Reservoir area, which could be adversely affected by habitat loss, noise, and potential cumulative impacts. Habitat loss is being mitigated by the Bonita Creek reconstruction project discussed above, and noise effects will be mitigated by the inclusion in the project of a noise barrier along the south side of the SJHTC adjacent to Bonita reservoir, grading restrictions to certain months and certain times of the day, and other measures. Section 7 consultation (under the Endangered Species Act) was completed with the U.S. Fish and Wildlife Service (FWS) to address potential impacts to the vireo. TCA prepared a Biological Assessment addressing this species, and a "No Jeopardy" opinion was published by FWS. That opinion can be found in Appendix D of the FEIS for this project. Based on this information, and including the commitments made by TCA through this process, the Commission finds the project will not adversely affect the least Bell's vireo and is consistent with the habitat policies of the Coastal Act with respect to this species.

(ii) California gnatcatcher (and Cactus wren)

The agencies consulted believe that because of the similarity of their habitat (coastal sage scrub habitat), measures adequate to protect the gnatcatcher would also protect the cactus wren. Therefore the following discussion focuses primarily on the gnatcatcher.

Populations of the Cactus wren (Campylorhynchus brunneicapillus) and California gnatcatcher (Polioptila californica californica) are rapidly declining as a result of coastal sage habitat loss. In coastal Southern California these species are found in coastal sage scrub habitat, and surveys by TCA (contained in the Biological Assessment found in the FEIS) indicate the presence of both of these throughout the SJHTC. Gnatcatchers were found by TCA surveys at eight sites along the proposed corridor route in 1990. The greatest concentration was observed on the north and west sides of Bonita Reservoir, an area more intensively covered than anywhere else along the route. During 1991 TCA surveys, gnatcatchers were sighted at four locations within the Corridor route: (1) Sycamore Hills between Laguna Canyon Road and El Toro Road; (2) two thirds of a mile south of the proposed Sand Canyon interchange in Upper Bommer Canyon; (3) near Coyote Canyon landfill methane Recovery Plant; and (4) adjacent to Bonita Reservoir. The surveys conducted by TCA, which the Fish and Wildlife Service believes are incomplete, nevertheless include multiple sightings of cactus wrens, as well as gnatcatcher habitat (and at least one actual sighting in or immediately adjacent to the coastal zone), in the area within the coastal zone where the project would directly remove its habitat, on Moro Ridge in unincorporated Orange County. Exhibits 16-17 depict the general gnatcatcher habitat area that would be bisected by the SJHTC, as well as the one or two specific stands of such habitat within the coastal zone that would be physically removed by the portion of the project in the coastal zone.

According to the Fish and Wildlife Service, habitat for these species is one of the most rapidly diminishing habitats in the entire nation. The Fish and Wildlife Service estimates that approximately 90 percent of the coastal sage scrub historically present in California has been destroyed in recent times. The Commission considers this habitat to be environmentally sensitive habitat, and is reviewing the project based on Section 30240 of the Coastal Act. The Commission also notes, however, that only a small portion of the project is located in the coastal zone. Additionally, efforts are currently underway to analyze project impacts on this and other coastal sage habitat using the process established by the Endangered Species Act. This process and the results of this process as applied to date to this project are described in the following two paragraphs.

Because these two species are not listed species, but are proposed for listing under the Endangered Species Act (ESA) (see Exhibit 23 for listing categories under ESA), the review process that is being conducted with the Fish and Wildlife Service is called "conferencing" rather than "consultation" (see 50 CFR section 402.10). The conferencing results are less binding than consultation; the results indicate what measures would be needed to protect these species if the species were to become listed. The applicant is free to disregard the conferencing recommendations under the Endangered Species Act, but it does so with some risk: if the species later is listed the project will likely be stopped and the consultation process will have to be initiated. If the applicant complies with the FWS recommendations through the conferencing process, it has the assurance that if the species is listed it already has incorporated adequate protection of the species into the project and avoids the risk of the project being halted for further consultation. Thus, unlike with a listed species, where consultation is binding, conferencing is not binding under the Endangered Species Act.

If a species is listed by FWS as threatened or endangered before project completion, the project will become subject to the provisions of the Federal Endangered Species Act (ESA). The Act: (1) prohibits any federal agency from authorizing an activity which would jeopardize the continued existence of a listed species; (2) requires federal agencies to formally consult with USFWS if a project they authorize "may affect" a listed species (Section 7 consultation); and (3) prohibits "take" of a listed species unless formally authorized by USFWS. Assuming that listing occurred before completion of the activities authorized by a 404 permit granted by the Corps, formal consultation between the Corps and USFWS would result in either: (1) a "no-jeopardy opinion" if the project would not jeopardize the continued existence of the gnatcatcher, specification of conservation measures necessary to minimize "take," and authorization of incidental take during project implementation; or (2) a "jeopardy opinion" if the project would jeopardize the gnatcatcher and, if so, identification of reasonable and prudent alternatives which would be implemented to avoid jeopardy. In contrast, if listing occurred after completion of work authorized by the Corps, but before completion of project elements which would affect gnatcatchers, the project sponsor would be required to obtain authorization for this incidental take through a Section 10a permit, which would require preparation of a Habitat Conservation Plan (HCP) or participation in an approved HCP.

The Fish and Wildlife Service (FWS) stated in commenting on the DEIS:

The FWS is reviewing the status and distribution of the gnatcatcher and a preliminary analysis of the data accumulated to date suggests that its proposal for listing is probably warranted. As a result of this review, it may likely be proposed for listing, and later may potentially be listed before the project is begun or ultimately completed.

The gnatcatcher is widely distributed and relatively numerous in both proposed alignments. The ongoing and expected rate of destruction of the gnatcatcher's coastal sage scrub habitat, combined with the paucity of efforts to adequately mitigate these impacts, could prompt the FWS to emergency list this species in order to assure its continued existence. The preliminary data supplied by the draft statement, biological consultants, and FWS biologists strongly suggest that the proposed project will result in substantial, significant, unmitigated impacts to the gnatcatcher and its habitat.

If and when the listing of the gnatcatcher occurs, the species would be protected from "take" (e.g., harass, harm, kill) pursuant to Section 9 of the Act unless and until a Section 10a permit is issued. Or alternatively, if a Federal discretionary action is involved, a formal consultation pursuant to Section 7 of the Act must be completed.

Until the issues mentioned above are satisfactorily resolved, the FWS advises that it would endorse only the No Build Alternative.

In any case, the data presented [in the Draft EIS] are unclear and incomplete, and the FWS cannot adequately assess potential, direct or indirect impacts to the gnatcatcher.

Further, when the entire length of the corridor is considered, the total acreage of coastal sage scrub habitat lost may actually be much greater than that reported in the draft statement. If one includes the sections of the proposed corridor route which have already been constructed in conjunction with residential and commercial subdivisions and for which coastal sage scrub habitat has already been destroyed, the total project impacts to this sensitive species and habitat type (and possibly others), may be substantially greater than is reported.

The draft [EIS] ... recognizes that "complete mitigation of the habitat impacted by the corridor through revegetation would be difficult due to the large size of the impacted area and poor likelihood of successful regeneration," and does not contain specific proposals to mitigate potentially substantial and significant impacts to the gnatcatcher or other sensitive species such as the whiptail, horned lizard, Orange County turkish rugging, and many-stemmed live-forever which occur in coastal sage scrub habitat. It is estimated that approximately 90 percent of the coastal sage scrub historically present in California has been destroyed in recent times.

The FWS does not consider crushing instead of blading or ripping above-ground vegetation, nor revegetation of corridor slopes with native plant materials, to be appropriate mitigation for the destruction of large tracts of coastal sage scrub habitat. These measures only very slightly minimize permanent reductions in losses of habitat quantity and quality.

The FWS suggests that appropriate mitigation for the loss of coastal sage scrub consists of in-kind habitat replacement and/or the dedication of lands of sufficient size to sustain biologically viable populations of gnatcatchers and/or other sensitive species. If the gnatcatcher is federally listed, the FWS may well recommend mitigation requirements similar to these in conjunction with a habitat conservation plan.

The Department of Fish and Game stated in its DEIS comments:

In addition, the Department requests mitigation/compensation contingency plans for all other candidate species expected to be impacted by SJHTC, due to the recent passage of AB 2172 (natural community planning effort). With the California gnatcatcher under Federal consideration, with state litigation pending, and Federal consideration pending on the cactus wren, mitigation/compensation (with avoidance being preferable) measures for these species will most likely be necessary to comply with either AB 2172 or CEQA. Direct and cumulative impacts to pristine coastal sage scrub habitat and the associated sensitive species including gnatcatchers, cactus wrens, coast horned lizards, orange-throated whiptails, many-stemmed dudleya, etc., will be significant and should be compensated for regardless of legislative mandate.

In response to these concerns, TCA states:

There is no specific prohibition of "take" of proposed species under the federal Endangered Species Act (ESA). However, the ESA requires conferencing with the U.S. Fish and Wildlife Service (USFWS) for any federal action that is likely to jeopardize the continued existence of the species. This conferencing is designed to resolve potential conflicts before the species is listed. In the case of the Corridor, TCA does not believe the project is likely to jeopardize the existence of the species, especially when the project is considered in light of the proposed coastal sage scrub mitigation program described below. Nevertheless, the TCA is cooperating with the Federal Highway Administration (FHWA, the federal Lead Agency), in a conference with the USFWS. This conference is being conducted in accordance with the procedures for formal consultation for listed species. It is anticipated that the result of this conference will be a "no jeopardy" opinion, which can be applied to the species in the event it is listed prior to project construction.

[TCA quotes (continued):]

B. CORRIDOR EFFECT ON THE COASTAL ZONE

A supplement to the Biological Assessment for the California gnatcatcher, prepared at the request of USFWS, has been provided to the USFWS by FHWA. This supplement includes the draft data that is being prepared for the Natural Communities Conservation Plan (NCCP). This data shows the locations of California gnatcatcher, cactus wren and coastal sage scrub habitat types as mapped by Jones & Stokes for The Irvine Company. According to this data, there were no California gnatcatcher locations within the coastal zone area that would be directly graded. Scrub habitat types in this area include Venturan/Diegan transitional coastal sage scrub and cactus scrub. Other habitats, such as grassland and chaparral, also occur in this area. In the 1992 breeding season, the nearest gnatcatchers to the Corridor within the coastal zone included one pair and one single that were observed approximately 1,000 feet from the centerline of the Corridor. This corresponds to the border of the maximum limit of indirect effect described in the Supplement to the Biological Opinion, i.e., these birds would be minimally affected if at all, but were included in the upper limits of the range of potential effects estimated at the request of the USFWS.

C. GNATCATCHER/COASTAL SAGE SCRUB MITIGATION

The TCA recognizes the importance of the project's impacts to coastal sage scrub habitat and, in particular, to the California gnatcatcher. As a result, TCA has conducted conferencing discussions with the USFWS under Section 7 of the ESA and committed to a proposed program that includes three components:

- The project mitigation measures identified in the EIR/EIS include the revegetation of all graded slopes in undeveloped areas with coastal sage scrub vegetation, as appropriate. The methods and standards for this revegetation will be defined in the Resource Management Plan, which will be reviewed by the California Department of Fish and Game (CDFG) and the U.S. Fish and Wildlife Service (USFWS). The composition of the revegetation palette will depend on slope steepness and orientation, and will be based on transects of existing coastal sage scrub on various slope aspects. These transects have already been completed as a first step in the preparation of the Resource Management Plan. Attached is the framework for coastal sage scrub revegetation plans that are currently envisioned as part of the Resource Management Plan.
- In addition to the revegetation of graded slopes in the Corridor right-of-way, TCA has committed to the restoration of coastal sage scrub on degraded areas within public lands, including potentially the Coyote Canyon landfill which is a site in close proximity to the SJHTC.

[TCA quotes (continued):]

- Additional coastal sage scrub acreage will be secured and dedicated for habitat purposes through some combination of restoration, maintenance endowment and/or deed restriction.

As part of the implementation of this program, the TCA has committed to the preparation of a Habitat Conservation Plan (HCP) in cooperation with the U.S. Fish and Wildlife Service. This plan, which must be approved by the USFWS, will provide the mechanism for issuance of a "no jeopardy" opinion by the USFWS and the authorization of incidental take of the California gnatcatcher in the event that the species is listed prior to or during project implementation.

In addition to the preparation of an HCP specifically for the Corridor project, the TCA is a participant in the Natural Communities Conservation Program NCCP/HCP for the Coastal Subregion of Orange County. Although the land affected by the Corridor is not specifically enrolled in this process (due to the fact that development may be begun within the 18 month moratorium period required by enrollment), TCA is participating through a contribution to funding of the program. Enrollment of the remainder of the NCCP land in Orange County (78,000 acres of private land) has been completed. In conjunction with State and federal enrollments, this represents 90 percent of the coastal sage scrub in the County which will remain undisturbed during the planning process. In addition, agreements with the resource agencies to prepare the subregional plans have been reached and the consultant that will prepare the plans have been engaged. It is anticipated that the Corridor HCP will be incorporated into this larger plan.

TCA elaborates:

Pursuant to a direct initiative undertaken by the Resources Agency of the State of California, Assemblyman Kelly obtained the passage of AB 2172, which was signed into law by Governor Wilson. AB 2172 defines a Natural Community Conservation Planning (NCCP) process for carrying out multi species habitat planning under the direction of the California Department of Fish & Game. For its part, the TCA is actively participating with the Resources Agency and interested parties, and has attended a number of organizational and planning meetings involving interested landowners and local government agencies, including the County of Orange EMA. The TCA Board has authorized an expenditure of \$100,000 in furtherance of the NCCP process in areas potentially affected by the construction of the Corridor.

EPA stated (in its FEIS comments):

The Final EIS notes that it would be difficult due to the large size of impacted areas and poor likelihood of successful generation to fully mitigate the impacts of the Corridor [itself] to Category 3 habitat (page

4-85). It also notes the creation of the Natural Community Conservation Planning (NCCP) to carry out multi-species habitat planning. Although the FEIS notes TCA's participation in meetings with Resource Agencies (page 4-84), we understand that TCA does not consider the SJHTC within the scope of its participation in the NCCP process for the purposes of addressing potential project impacts to the California gnatcatcher, a proposed federal endangered species.

We encourage the project sponsors to identify measures to mitigate the Corridor's impacts to all Category 3 habitat, including coastal sage scrub on which the gnatcatcher relies, since the NCCP process is not considered to be SJHTC mitigation by the resource agencies.

FWS stated in an Oct. 23, 1992, letter to the Commission (Exhibit 18):

Specifically, you have requested information on possible, project-related impacts to the coastal California gnatcatcher (Polioptila californica californica; "gnatcatcher"), a species that was proposed as endangered by the Fish and Wildlife Service (Service) on September 17, 1992, (Federal Register 50 [80]:47053-47060) and coastal sage scrub, a sensitive habitat type.

The Coastal California gnatcatcher is a recognized subspecies of the California gnatcatcher (Polioptila californica [Brewster]) and is endemic to coastal southern California and northwestern Baja California, Mexico (American Ornithologists' Union 1983, 1989: 535; Atwood 1980, 1988, 1990). This small gray songbird is an obligate resident of coastal sage scrub dominated plant communities from Los Angeles County generally south along the coast to the United States/Mexico border (see, for instance, Grinnell and Miller 1944; Garrett and Dunn 1981).

Although the documented decline of the gnatcatcher undoubtedly is the result of numerous factors, including nest depredation and brood parasitism by the essentially non-native brown-headed cowbird (Molothrus ater), habitat destruction, fragmentation, or modification must be cited as principal reasons for the gnatcatcher's current, precarious status. It has been estimated that as much as 90% of coastal sage scrub vegetation has been lost as a result of development and land conversion (see Westman 1981a, 1981b; Barbour and Major 1977), leaving a coastal sage scrub as one of the most depleted habitat types in the United States (Kirkpatrick and Hutchinson 1977; Axelrod 1978; Klopatek et al. 1979; Westman 1987; O'Leary 1990).

Accordingly, we concluded in our comments on the Draft Environmental Impact Statement for the SJHTC that a project of that magnitude, as currently proposed, will have a significant impact upon the gnatcatcher and its coastal sage scrub habitat.

[FWS quotes (continued):]

Recognizing this fact, the Federal Highway Administration (FHWA) has initiated conferencing (FHWA letter dated 10/21/92 on behalf of the TCA) on the gnatcatcher pursuant to 50 CFR 402. The FHWA and the Transportation Corridors Agency have submitted an addendum to this biological assessment and anticipate providing a draft habitat conservation (mitigation) plan in the near future. Because these documents have just recently been received, however, we cannot presently determine to what extent the project will impact the gnatcatcher, coastal sage scrub, or a variety of sensitive species that reside therein.

The available data, albeit incomplete, suggest that as many as 20 pairs of gnatcatchers and over 155 acres of coastal sage scrub habitat would be directly impacted by the project. As you intimated in your letter, indirect effects of the project could include making noise, lighting interferences, increase in pollutants, disruption of wildlife corridors, increased risks of fire, and the eruption of non-native plants of animals in the project area and environs.

Perhaps most importantly, the SJHTC as currently proposed also would effectively bisect what we believe to be a large and important gnatcatcher population in the San Joaquin Hills and environs. Given the fundamental tenets of island ecology we have concerns regarding the potential known effects of habitat fragmentation. We will be considering this issue in relation to the size of reserves provided on either side of the Corridor. It is our understanding that these reserves may include thousands of acres. The outcome of this issue will determine whether the gnatcatchers and coastal sage scrub within the prescribed coastal zone could be significantly impacted due to indirect effects attributable to the construction and operation of the SJHTC. Given the maps that you have provided, it seems clear that gnatcatchers within the prescribed coastal zone under your jurisdiction will be affected by the project.

Unfortunately, it appears that the gnatcatcher and coastal sage scrub may be further impacted or depleted due to the cumulative effects of other local (and Corridor) projects. Cumulative effects are those impacts of future State and private actions affecting endangered and threatened species that are reasonably certain to occur in the action area. Many of these planned or active projects (e.g., Foothill Transportation Corridor) have not provided or proposed substantive mitigation or project-related impacts to the gnatcatcher or coastal sage scrub habitat.

We expect that a mutually acceptable habitat compensation plan will be developed that provides substantial compensation for project-related impacts. The Service has major concerns regarding potential project-related, cumulative, and growth-induced impacts to the gnatcatcher, coastal sage scrub, and many other sensitive species that reside therein.

Commission Conclusion. Based on the information presented, the Commission finds that the project's effects on gnatcatcher habitat constitute adverse impacts on environmentally sensitive habitat within the coastal zone. Thus, the project is inconsistent with the requirements of Section 30240 of the Coastal Act.

As the Commission has previously found, however, this project is consistent with and promotes other policies of the Act relating to public access and recreation, including Sections 30210, 30211, 30212, 30212.5, 30213, 30252 and 30254. As also discussed above, when dealing with permits which promote some policies of the Act, while conflicting with others, the Commission is required to resolve such conflicts by balancing and reaching the decision which is most protective of coastal resources. (See Sections 30007.5 and 30200(b).)

Findings / In conducting this balancing function in this situation the Commission notes that only a small portion of the project, approximately one half of a mile, is located in the coastal zone. Additionally, TCA is currently engaged in the conferencing process with the U.S. Fish and Wildlife Service to fully assess the project's impacts on the gnatcatcher and develop any necessary mitigation measures. The Fish and Wildlife Service expects that this process will lead to the development of a "mutually acceptable habitat compensation plan." TCA also has made further commitments to the Fish and Wildlife Service to do what is necessary to accommodate the gnatcatcher, as noted in FWS' November 9, 1992, letter to the Commission (Exhibit 29), which states:

We are extremely gratified to learn that the TCA, the project sponsor, is presently committed to do everything that is necessary and required to insure that a viable reserve or reserves will be established in the San Joaquin Hills and environs to accommodate the gnatcatcher and coastal cactus wren (Steve Letterly, personal communication, 9 November, 1992).

Finally to assure that any habitat compensation plan developed by TCA and the Fish and Wildlife Service will be sufficient to offset any impacts to the small portion of the gnatcatcher habitat that will be located in the coastal zone, TCA has agreed to incorporate the following commitment:

TCA shall provide funding assurances to the satisfaction of the Executive Director that guarantee that \$400,000 will be deposited in an interest bearing account from toll revenues, payable to the Coastal Conservancy no later than one year after commencement of operation of the toll road. The funds will be used to improve gnatcatcher habitat in the project area. This requirement shall be above and beyond current TCA mitigation commitments.

Based on these commitments and understandings regarding the Fish and Wildlife Service conferencing process, the Commission finds that on balance approval of this project will be most protective of coastal resources, while also promoting the Coastal Act's objectives of promoting public access and recreation. For this reason, the Commission finds the project is consistent with the Coastal Act.

(iii) General Wildlife Impacts.

TCA states:

Orange County, in conjunction with major landowners and with the City of Laguna Beach, has for the last decade gained binding commitments of major blocks of open space/habitat/recreation lands known as the Laguna Greenbelt. All of these lands have been assembled with the intent of creating large blocks of contiguous open space lands. These large blocks of open space would provide a much greater degree of habitat protection than attempting to mitigate projects one by one with a resulting fragmentation of habitat/open space areas.

An example of such an approach is the creation of the 3,400-acre Aliso Greenbelt. Similarly, the Irvine Coast Open Space Dedication program will provide for the preservation of 2,666 acres of habitat and open space lands, which in combination with the 2,800-acre Crystal Cove State Park (created through State purchase and the Moro Ridge gift by The Irvine Company) will result in over 5,000 acres of contiguous open space/habitat areas. Another County action requiring the dedication of the Laurel Canyon area, which is contiguous with this 5,000-acre greenbelt, will add another 675 acre of open space/habitat.

The individual open space dedications by area developments do not discount the fact that wildlife habitat continues to shrink in size in the south County. The County's Laguna Greenbelt open space preserve does not create more habitat. There is a net loss of wildlife habitat due to Corridor construction. As stated above, this is a significant impact and an unavoidable loss of open space/wildlife habitat.

As partial mitigation for impacts to wildlife movement, three wildlife crossing features have been added to the project design. These three crossings are located in Laguna Canyon (west of and parallel to Laguna Canyon Road), the interface of Shady and Emerald Canyons and at the head of the western fork of Bommer Canyon. Design modification in the Bonita Creek area will allow wildlife movement through this area as well. The ramps for MacArthur will be elevated on a bridge structure over Bonita Creek. In addition to the wildlife crossings, the Corridor will cross San Diego Creek, Aliso Creek, and Oso Creek on bridges. These areas are not proposed as wildlife crossings; however, they would provide that opportunity.

Exhibit 19 depicts wildlife corridors potentially affected by the project. The FEIS acknowledges:

Sensitive Wildlife Species. The direct, local and cumulative regional loss of habitat and possible loss of individuals for sensitive species due to the project are unavoidable adverse impacts upon those species. The sensitive species seen along the corridor are: the monarch butterfly; southwestern pond turtle; San Diego horned lizard;

orange-throated whiptail; black-shouldered kite; northern harrier; Cooper's hawk; red-shouldered hawk; golden eagle; American peregrine falcon; willow flycatcher; cactus wren; California gnatcatcher; least Bell's vireo; yellow warbler; yellow breasted chat; grasshopper sparrow; tricolored blackbird; pallid bat; California mastif bat.

With the continued urbanization of Orange County, and the expansion of urban infrastructure in northeast and southeast Orange County, considerable natural habitat and open space areas would be eliminated. The cumulative impacts associated with regional habitat destruction are as follows:

- a. The prime impact would be the construction of the Corridor, in particular, project related grading. This would impact wildlife productivity within the region. In turn, the fauna would undergo pressures to relocate to suitable habitat. No species would be permanently displaced, although some individuals would be eliminated during construction.
- b. Some of the predators and prey with larger ranges and territories would be displaced into more remote areas. This is a disruptive force between predator-prey relationships.
- c. There would be a decrease in species diversity due to the decrease in variability of habitats within the Corridor's grading area.
- d. Total number of habitable acres available to wildlife would decrease, causing increased competition for remaining resources.
- e. Tertiary and secondary consumers with larger ranges and territories will be displaced into more remote areas. This serves as a disruptive force between predatory-prey relationships, increasing the competitive forces between the higher consumers and limiting their ranges. Some prey and predator species have a tendency to increase dramatically around the fringes of urbanization and become a nuisance.

The FEIS concludes:

The Corridor would significantly impact the following biological resources/issues:

Removal and fragmentation of wildlife habitat in general and foraging habitat for raptors.

Direct and cumulative (regional) loss of open space habitat and wildlife individuals.

Unavoidable adverse impacts to sensitive resources:

Category 3 species: oak woodland, oak savannah, chaparral, coastal sage scrub, dudleya and Turkish rugging.

Sensitive wildlife species - reduction in individuals and habitat.

Disruption of wildlife dispersion patterns.

Night-time facility lighting on nocturnal wildlife activity.

Significant unavoidable adverse impacts remaining after full and successful implementation of project mitigation include: 1) the loss of and resulting reduction of coastal sage scrub and chaparral habitats, including habitat for the sensitive species California gnatcatcher, San Diego horned lizard, orange-throated whiptail, cactus wren, pallid bat, and California Mastiff bat; 2) overall restriction of Wildlife movement; 3) fragmentation of wildlife habitat; and 4) reduction in wildlife populations.

Addressing wildlife movement in general, TCA states:

Although wildlife movement across the Corridor will still be impeded, especially along some of the smaller drainages and saddles that cross the ridge, the Corridor is currently designed to allow wildlife movement beneath the Corridor in three areas to connect these major open space areas. These connections will prevent genetic isolation, allow movement to help balance population distributions, and permit the movement of wider ranging mammals, such as the coyote.

Nevertheless, while the project's general wildlife impacts to the region are clearly adverse and significant, as identified in the FEIS for the project, most of the project is located outside the coastal zone, and most of these effects will occur outside the coastal zone. Given the fact that only a small portion of the SJHTC outside San Diego Creek (approximately 1/2 mile) is located within the coastal zone, the Commission is limiting its review of habitat impacts to: wetlands losses within the coastal zone, and impacts on particularly sensitive habitat resources, such as rare, especially valuable, threatened or endangered species, and where the project's habitat impacts represent clear spillover impacts on coastal zone resources. Consequently, notwithstanding the adverse and significant habitat and wildlife impacts identified in the FEIS for the overall project, the Commission finds the project consistent with the habitat protection policies (Section 30240) of the Coastal Act.

C. WATER QUALITY

1. Regulatory Provisions

CZMA Section 307(f). This section of the Coastal Zone Management Act provides:

(f) Notwithstanding any other provision of this title, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this title and shall be the water pollution control and air pollution control requirements applicable to such program.

Coastal Act Policies. Section 30230 is quoted on page 16. Section 30231 provides:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30412 provides:

(a) In addition to the provisions set forth in Section 13142.5 of the Water Code, the provisions of this section shall apply to the commission and the State Water Resources Control Board and the California regional water quality control boards.

(b) The State Water Resources Control Board and the California regional water quality control boards are the state agencies with primary responsibility for the coordination and control of water quality. The State Water Resources Control Board has primary responsibility for the administration of water rights pursuant to applicable law. The commission shall assure that proposed development and local coastal programs shall not frustrate the provisions of this section. Neither the commission nor any regional commission shall, except as provided in subdivision (c), modify, adopt conditions, or take any action in conflict with any determination by the State Water Resources Control Board or any California regional water quality control board in matters relating to water quality or the administration of water rights.

Except as provided in this section, nothing herein shall be interpreted in any way either as prohibiting or limiting the commission, regional commission, local government, or port governing body from exercising the regulatory controls over development pursuant to this division in a manner necessary to carry out the provisions of this division.

2. Jurisdiction. TCA questions the Commission's jurisdiction over sedimentation and water quality, citing the fact that the project will be operating under a new NPDES program, the construction site stormwater discharge regulations. TCA states:

With respect to water quality impacts such as short-term construction sediment and long-term stormwater runoff, the Coastal Commission is not empowered to regulate water quality measures under the CZMA and, under the California Coastal Act, the Coastal Commission has a subordinate position to the State Water Resources Control Board (SWRCB) and to the Regional Water Quality Control Boards (RWQCBs).

Regarding the CZMA, Section 307(f) of the CZMA (16 USC 1456) states that no action taken pursuant to the CZMA may conflict with requirements adopted by states and local government pursuant to the provisions of the Clean Water Act.

The Legislative History for the non-point coastal pollution control program added to the CZMA by the 1990 amendments to the CZMA makes clear that these amendments were not intended in any way to alter the fundamental statutory framework for coastal water quality regulation as set forth in Section 307(f) above.

The California Coastal Act contains a water quality provision comparable to Section 307(f) of the CZMA (Section 30412 b).

Both the substantive provisions of the EPA construction site stormwater discharge regulations and the draft SWRCB regulations implementing the EPA Clean Water Act requirements address the full range of construction site sediment control and long-term water quality discharge concerns previously addressed by the Coastal Commission under the California Coastal Act due to the prior absence of direct Clean Water Act regulation of such activities. With the implementation of the EPA/SWRCB regulatory review program as of October 1, 1992, state water quality agencies will now be addressing directly the runoff issues previously reviewed by the Commission under the Coastal Act. Thus, as of October 1, 1992, the RWQCBs will be implementing a construction site stormwater program which, under the terms of the federal CZMA, will become "the water pollution control requirements applicable to such program, and, under Section 30412 of the California Coastal Act, will become the "determination by the SWRCB or any RWQCB in matters relating to water quality" effectively occupying this area of regulations and with which the Coastal Commission may not take any conflicting actions.

The Commission disagrees with TCA's analysis of jurisdictional limitations. The Commission finds that Section 307(f) of the CZMA simply incorporates into the CCMP Clean Water Act requirements, thus adding them to the policies of the Coastal Act that the Commission may employ in reviewing water quality and sedimentation impacts. Further, the Commission is not taking any position on this consistency certification that could be construed as a conflict with any water quality determination by the SWRCB or a RWQCB.

3. County-Wide Water Quality and Sedimentation Controls. Provisions of the Master Drainage and Runoff Management Plan (MDRMP), which was an implementation measure of the Irvine Coast Local Coastal Program certified by the Commission in 1987, institute a water quality management and monitoring program, subject to review by the Regional Water Quality Control Board. Among the goals of the MDRMP are the provisions that:

Peak flood discharge rates of storm water flows in the major streams shall not exceed the peak rates of storm water runoff from the area in its natural or undeveloped state, unless it can be demonstrated that an increase in the discharge of no more than 10% of the natural peak rate will not significantly affect the natural erosion/beach sand replenishment process.

Adequate maintenance of retention basins shall be assured...

Runoff from development will be conveyed to a natural drainageway or discharge structure will sufficient capacity to accept the discharge. Sediment movement in the natural channels shall not be significantly changed in order to maintain stable channel sections and to maintain the present level of beach sand replenishment.

4. Project Impacts. The watersheds that will be directly affected by the SJHTC are depicted in Exhibit 20 and are described by TCA as the following segments: (1) San Diego Creek/Upper Newport Bay/San Joaquin Marsh/Bonita-Coyote Creek/Sand Canyon-Bommer Creek; (2) Laguna Canyon; (3) Aliso Creek/Aliso Canyon Canyon/Wood Canyon; (4) Sulphur Creek/Salt Creek; and (5) San Juan Creek/Oso Creek/Trabuco/Horno Creek. Because all of these drainages except Laguna Canyon are already significantly impacted by urbanization, TCA states that impact of the SJHTC is, at worst (i.e., without any mitigation), a very small increment in cumulative adverse impacts. TCA states:

As demonstrated by the analysis of runoff volume and rate, the overall unmitigated hydrologic impact of the project is insignificant. Local increases in runoff due to the roadway surface will be mitigated by appropriate bridge drainage design to minimize or eliminate any increase in runoff rate. Likewise, total volume increases in runoff due to increased bridge runoff are so small that, when combined with runoff rate attenuation mitigation measures, the direct and indirect cumulative contribution is negligible.

In simple terms, the potential for increased erosion or headcutting in the lower reaches of a watershed is governed by the concept of sediment continuity, which is an application of the principle of mass continuity. Specifically, erosion in a channel reach below the Corridor would require a significant reduction in upstream sediment supply, creating a sediment deficit in the lower channel, or a significant increase in transport capacity created by increased runoff volume and rate. As discussed above in the response to runoff volume and rate comments, significant increases in runoff will not occur as a result of the activity and hence there will not be erosion due to an increase in sediment transport capacity.

Only San Diego Creek discharges into a bay environment where dramatic changes in freshwater inflow might be significant; however, as demonstrated by the above analysis, the expected change in runoff volume and rate in San Diego Creek as a result of the project is so insignificant that it would not be measurable in the field.

As contained in the FEIS for the project, and stated in full in Exhibit 21, TCA has included in the project Mitigation Measures 3-9 and 17-12, designed to assure: (1) preparation of a Runoff Management Plan (RMP) to meet threshold levels as determined by the RWQCB; and (2) preparation of an Erosion and Siltation Control Plan, which will include both construction and operation measures such as performance standards to ensure adequate control of erosion and siltation downstream of the Corridor, use of energy dissipators where necessary, and retarding basins. TCA states that these mitigation measures are consistent with the substantive provisions of the draft SWRCB NPDES/SWPP requirements. These measures include: (1) retarding measures to maintain runoff velocity and quantity; (2) bridge and channel design to prevent lateral erosion; (3) drainage improvement plans and coordination/approval of such plans by the cities and the County to avoid adverse impacts on those agencies' facilities; (4) no net increase in runoff downstream in Laguna Canyon; and (5) control of peak downstream runoff rates to decrease scouring effects in Bonita, Bommer, Laurel, Laguna and Wood Canyons. Examples of structural measures include: (a) Extended detention ponds (retarding/desilting basins); (b) Infiltration basins; (c) Water quality inlets and oil separators; and (d) Vegetative practices/environmental channels, Wet ponds/wetland mitigation sites, Infiltration trenches/filter strips/urban forestry/basin landscaping/shallow marsh creation.

TCA states:

Caltrans and TCA will be responsible for the maintenance of the proposed drainage and environmental mitigation facilities. Caltrans and TCA will ensure the proper operation and functioning of such facilities by providing the necessary cleaning and maintenance.

Location of final disposal of pollutants will be addressed as part of the Corridor final design and will be monitored by TCA. The above specific design measures for each BMP [Best Management Practice] will be selected pursuant to FEIR Mitigation requirements and the SWRCB as administered by the Regional Water Quality Board.

With the above measures, TCA concludes:

The calculations of long-term sediment loading were prepared to ensure proper long-term sediment loading of runoff waters pursuant to Mitigation Measure 3-9. Thus, the analysis was carried out in conformance with the criteria for the Runoff Management Plan as identified in Mitigation Measure 3-9. This additional work confirms that the mitigation measures can be carried out and that the criteria identified in the measures can be achieved. This is demonstrated through the following conclusion of the analysis: the reduction in sediment yield due to the construction of the Corridor is not significant, and there will be no increase in erosion as a result of the project.

Consistent with the requirements of the Coastal Act, Corridor construction will not have a significant effect on water quality within downstream resources located in the Coastal Zone for the reasons set forth above.

The conclusions summarized in the FEIS ... confirm that the mitigation measures can be carried out and that ... : 1) increases in runoff volumes and rates due to the Corridor are minor, and 2) existing and planned reservoirs/retarding basins/channels will regulate flows such that there will be no significant increases in runoff rate and volume.

For the reasons set forth above, SJHTC Mitigation Measures, as carried out through FEIS RMP mitigation requirements and NPDES construction project SWPP requirements of the SWRCB/RWQCB, reduce potential SJHTC erosion, sedimentation, water runoff volume/rate and water quality impacts to levels of insignificance, consistent with Coastal Act Sections 30230 and 30231.

Anecdotal evidence submitted to the Commission by several project opponents indicates that sedimentation may have increased significantly due to development of the Irvine Coast. Since the project's mitigation measures and monitoring would be based on the same County-wide standards as that development, concerns were expressed by the Commission staff regarding whether adequate baseline information exists, necessary to compare post-construction sediment and water quality results, and assure compliance with the FEIS mitigation measures. The staffs of the two Regional Water Quality Control Boards with jurisdiction over this project agree as to the legitimacy of these concerns.

In response to these concerns raised regarding the effectiveness of the existing controls on recent massive construction projects in Orange County, TCA states:

Subsequent to the preparation of the MDRMP, Several hydrologic and hydraulic design reports were prepared in accordance with the recommendations made in the MDRMP. Those design reports identified the sizes and configurations of structural Best Management Practices (BMPs),

as well as non-structural BMPs in order to control peak discharges, prevent pollutant discharge and balance the rate of sediment transportation. In addition, a water quality monitoring program was developed, and three automatic water quality monitoring stations were installed.

Since the start of construction on the Irvine Coast, the runoff and erosion control measures, as well as the water quality monitoring program required by the MDRMP, have been implemented by The Irvine Company with the review and approval of the County of Orange and the State Regional Water Quality Control Board (RWQCB).

Several reports evaluating the performance of the runoff and erosion control measures have been recently prepared by the experts in the fields of hydrology and marine biology. Additionally, on-site inspections of runoff and erosion control measures have been conducted by staff from the RWQCB, State Department of Fish and Game and State Department of Parks. Recent inspections by the various state agencies have indicated that the Control measures are adequate, and no deficiencies have been noted.

In response to concerns expressed by residents downstream of the Irvine Coast development regarding the impact of stormwater runoff to Morning Canyon, The Irvine Company retained Rivertech, Inc. to evaluate the performance of the runoff and erosion control measures for the watershed that drains into Morning Canyon.

Furthermore, Dr. Ford was commissioned by the Irvine Company... to [evaluate the Rivertech report,] evaluate runoff, erosion control and water quality measures for the Irvine Coast and to evaluate marine ecological conditions adjacent to Morning Canyon and at two other Irvine Coast sites...

Finally, in December of 1991 and March of 1992, Rivertech observed the erosion control measures for the Irvine/Newport Coast projects and their effectiveness after the winter storms of 1991/92.

According to TCA, all these studies establish that effective erosion control measures were properly implemented and worked effectively at preventing the substantial increases in downstream sedimentation and water quality and marine resource impacts associated with Irvine Company development. TCA further notes that in comparison with the area disturbed by the construction of Irvine Coast Planned Community Development, construction of SJHTC in the coastal zone will involve a relatively small area. TCA believes that:

The success of Irvine Coast mitigation measures, coupled with TCA's commitment to implement the same level of mitigation in a smaller area of site disturbance, establishes the basis for predicting the likely efficacy of the Runoff Management Plan BMPs in preventing adverse runoff impacts by the construction of SJHTC in the coastal zone.

In response to the need for monitoring for the SJHTC project, TCA states:

The Water Quality Monitoring Program will monitor for constituents in accordance with the NPDES requirements and the program will be coordinated with the State Water Resources Control Board and the Orange County Environmental Management Agency.

5. Commission Conclusion. The Commission finds that the creation of a Runoff Management Plan and monitoring program as required by the FEIS and proposed by TCA is feasible and will maintain water quality in the project area. The Commission also notes that water quality issues also will be addressed by the RWQCBs through the NPDES permit process. The Commission staff has, however, also expressed concern that the eventual success of this plan and program is dependant on TCA's willingness to provide the Commission and RWQCBs with additional baseline data. Such data is a necessary prerequisite to the preparation and implementation of a specific runoff plan and monitoring program. Based on this concern the staff recommended that TCA should commit to collect and submit such data to the Commission, and also agree to monitor pre-and post construction sedimentation and water quality. The baseline information and monitoring program should be submitted to both the Commission and RWQCBs for review prior to project construction. Staff also suggested that TCA should agree to institute necessary remediation measures should the monitoring results show that the standards committed to in the FEIS have not been achieved. In response to these requests TCA stated:

The final EIS for the SJHTC in Section 3, Water Quality, Paragraphs 3-9a and 3-9f, establishes SJHTC requirements for the monitoring program. The TCA will take water quality and sediment samples in the 1992-1993 rainy season to establish a baseline reference for the work on the SJHTC. Prior to beginning construction, a thorough monitoring program will be established on the watersheds, and the resulting data, collected post project, will be used to verify the efficacy of the project BMPs.

TCA has further agreed that, in addition to complying with NPDES permit requirements, it will submit its water quality monitoring program to the Commission. Thus TCA has committed to include assurances in the project requiring that prior to construction TCA will: (1) submit its monitoring program to the Executive Director of the Commission for his review and approval, in consultation with the staff of the Santa Ana and San Diego RWQCBs; and (2) include in this submittal baseline monitoring information which the Executive Director must determine, in consultation with the staffs of the RWQCBs, is adequate to result in a valid comparison of pre-and post-construction water quality data sufficient to establish whether the project is being conducted in a manner which conforms to the standards established in FEIS Mitigation Measures 3-9 and 17-12. TCA also agrees that it will modify the project to bring it into conformity with the standards established in FEIS Mitigation Measures 3-9 and 17-12 if monitoring shows that acceptable standards are not being met. (See Addendum to Staff Recommendation, attached as Exhibit 27, for the specific commitment language incorporated into the project). The Commission finds that these measures bring the project into conformity with the water quality provisions (Sections 30230, 30231 and 30412) of the Coastal Act.

(in) Ford Rd. Rd has ind. utility and that

One final water quality issue has been raised by project opponents, who have expressed concern that Ford Rd., a related project, has not been adequately analyzed in the FEIS or consistency certification by TCA or by the Commission. The Commission believes it can address any issues raised by Ford Rd. through independent review of that project when the environmental documentation, which is now being assembled, is complete. The Commission notes that by letter of April 6, 1992, to TCA (Exhibit 30), it has asserted federal consistency jurisdiction over that project.

D. PUBLIC VIEWS

Section 30251 of the Coastal Act provides:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

TCA analyzes the visual impact of the San Diego Creek crossing as follows:

The visual setting of the SJHTC San Diego Creek crossing is one of mixed types of development. While the San Diego Creek itself is a flood control channel, land uses and facilities near the crossing include residential and commercial uses (including high rise hotel on Jamboree and high rise office on MacArthur Boulevard close to the crossing), parks/open space (Bonita Creek Park) and other roadways (Mac Arthur Boulevard, Jamboree Road, University Drive and existing SR-73). When the SJHTC San Diego Creek crossing site is viewed from any direction, the viewer sees these other roadways and developments, in particular the MacArthur Boulevard crossing of the San Diego Creek. The SJHTC bridge over the San Diego Creek would follow approximately the same roadway profile as the existing MacArthur Boulevard Bridge. Thus, after construction, of the SJHTC bridge, views of the area will not be substantially different than in present conditions.... For the[se] reasons ... the Bridge over San Diego Creek and associated facilities are consistent with Section 30251 of the Coastal Act.

Exhibit 22 provides several visual renderings taken from the FEIS. Regarding the visual impact from the remainder of the SJHTC, TCA states:

The portion of Orange County served by the SJHTC was planned in a manner in which open space, development and transportation uses were cooperatively planned to insure a balance of land uses and infrastructure. The need for open space and parks and the need for the SJHTC were recognized at the same time, and planning activities were simultaneously initiated to ensure that both the open space and circulation needs of the County would be satisfied. This cooperative planning history is described in Section 4(f) of the FEIS ..., and the conclusions are briefly summarized below.

The existence of large land ownerships in south Orange County provided the County of Orange and other public agencies with the ability to establish significant open space and recreational land in conjunction with the approval of several master plan communities. The existence of the Corridor was specifically contemplated in the planning for these communities. Thus, the Corridor was an integral part of a plan that included development, as well as open space and recreational uses. The County and other agencies undertook significant efforts to insure that the location of the open space and other uses would be compatible with the location of the Corridor.

These planning efforts have resulted in the designation of over 16,000 acres of open space, recreational and wildlife habitat areas. Figure 3 of the Section 4(f) Evaluation depicts the areas included in this 13,000 acre system of parklands. ... These lands were assembled with the intent of creating large blocks of contiguous open space lands, rather than attempting to mitigate projects one by one with a resulting fragmentation of habitat/open space area. Examples of such an approach are the creation of the 3,400 acre Aliso Greenbelt (including Aliso/Wood Canyon Park), and the 2,666 acre Irvine coast Open Space Dedication Program. The Irvine Coast Program, which in combination with the 2,800 acre Crystal Cove State Park (created through State purchase and the Moro Ridge gift by The Irvine Company) will result in over 5,000 acres of contiguous open space/habitat areas.

For the reasons set forth above, the portions of the Corridor and associated facilities located outside the Coastal Zone and which are subject to Corps 404 review are consistent with Section 30251 of the Coastal Act.

The Commission agrees and finds that, given the already disturbed nature of the San Diego Creek area, which has two roads nearby traversing the creek (MacArthur Blvd. and Jamboree Rd.), the small extent to which portion of the project on Moro Ridge is located within the coastal zone, the project does not pose serious threats to scenic coastal public views and is consistent with Section 30251 of the Coastal Act.

E. GROWTH

Section 30254 provides:

New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division; provided, however, that it is the intent of the Legislature that State Highway Route 1 in rural areas of the coastal zone remain a scenic two-lane road. Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use,

essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

TCA states:

About 98.5% of the land in the Area of Benefit (see final EIS, figure 6.2 [Exhibit 5]) is the subject of either existing land uses or planned, committed land uses. Furthermore, the development of the committed land uses is not contingent on construction of the project corridor. Although the SJHTC is not expected to further influence the amount and pattern of growth in south Orange County, the project may affect the rate of growth. This potential increase in rate of development would occur only where there is sufficient market demand and if other services such as water, sewer, drainage, fire protection, and schools were also available.

Concerns have been raised regarding TCA's assumptions regarding growth. For example, EPA has consistently stated in commenting on the DEIS and FEIS that it "did not believe that the DEIS [and FEIS] had adequately analyzed the growth-inducing impacts of the proposed project, particularly cumulative impacts."

While TCA's growth assumptions may or not be accurate regarding the overall impacts in Orange County, the Commission does not believe the project would adversely affect growth in the coastal zone. The development intensities and, more importantly the large open space dedications, have fairly thoroughly established development patterns through the Irvine Coast segment of the Orange County LCP. Increases in traffic capacity should not result in pressures to alter these adopted land use intensities within the coastal zone. The Commission therefore finds the project would not induce development in the coastal zone inconsistent with Chapter 3 policies and would be consistent with Section 30254 of the Coastal Act.

F. LCP PREJUDICE

[Note: This section applies only to the coastal development permit.]

Based on direction from the Office of Ocean and Coastal Resources Management (OCRM), as mentioned on page 11 of this report, for purposes of federal consistency review Local Coastal Programs (LCPs) are not to be used as guidance in interpreting Chapter 3 policies, unless the LCP has been incorporated by OCRM into the CCMP. However, at the same time in reviewing the coastal development permit for the San Diego Creek portion of the project, the Commission is directed under Section 30604 of the Coastal Act to determine whether approval of a coastal development permit would prejudice the City of Newport Beach's preparation of its LCP. Section 30604(a) provides:

(a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a coastal development permit on grounds it would prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

The City of Newport Beach's Land Use Plan (LUP) portion of its LCP was certified by the Commission on May 18, 1982. The LUP provides (in Section A) that while wetlands and other environmentally sensitive areas are to be mapped and preserved, policy A.3 states:

Policies 1 and 2 above are not intended to ... prohibit public infrastructure when the environmental process demonstrates that adverse impacts can be mitigated, or that the benefits outweigh the adverse impacts.

The Commission also notes that, in the circulation section of the City's Land Use Plan, reference is made to the City's Master Plan of Streets and Highways, which is contained in the circulation element of the City's General Plan. the Land Use Plan states:

In order to preserve and enhance the existing circulation sytem [sic], the following policies are adopted:

The Local Coastal Program Circulation System Plan is the same as the City of Newport Beach Master Plan of Streets and Highways with the exception that the extension of University Drive between Irvine Avenue and MacArthur boulevard is not included.

This referenced Master Plan from the City's General Plan, Circulation Element, does in fact contain the SJHTC.

Based on the above information and policy language, the Commission finds that approval of this coastal development permit at this time would not preclude planning options and would not prejudice the ability of Newport Beach to adopt an LCP consistent with Section 30233 of the Coastal Act, and thus that approval of the coastal development permit would be consistent with Section 30604 of the Coastal Act.

G. CEQA

[Note: This section applies only to the coastal development permit.]

The SJHTC project, as conditioned, would not have significant adverse effects on the environment, within the meaning of the California Environmental Quality Act (CEQA). The project has been mitigated as discussed above to ensure consistency with the Coastal Act.

4132p

SUBSTANTIVE FILE DOCUMENTS

1. Consistency Certification No. CC-63-92 and Coastal Development Permit Application No. 5-92-232, including the following supporting documents and reports:

- A - Joint Powers of Authority Agreement
- B - Writ of Mandate Response
 - Legal Letters
 - Assembly Ways and Means Coastal Boundary Map (1976)
 - Other maps from Legislative
 - Senator Smith's Letter (1976)
 - Section 30169 of Coastal Act
- D - FEIS
- E - Coastal Commission Staff Notes on March 6 TCA Conference Call
- F - Analysis of Coastal Commission Staff Alternative
- G - Rivertech Report
- H - Marsh Creation Summary
- I - Irvine Coast CDP Findings
- J - EPA Regulations (Clean Water Act)
 - Final Rule 40, CFR 122, 57 Fed. Reg. 11394
 - Notice of Public Hearing - May 14, 1992 (SWRCB)
- K - "Approval in Concept" from Cities

2. Supplements to CC-63-92 Application No. 5-92-232, including the following supporting documents and reports:

- (SJHTC)/SR-73 Coastal Act Consistency Analysis for Federal Permit Activities within San Diego Creek and Coastal Zone
- (SJHTC)SR-73 Coastal Act Consistency Analysis for 404 Corps of Engineers Permit Activities Outside Coastal Zone
- Response to July 28, 1992, Coastal Commission Staff Request for Additional Information, September 8, 1992
- Marsh Creation Program, September 8, 1992
- Bonita Creek Mitigation and Enhancement Program, September 8, 1992
- Habitat Restoration Plan for Temporary Construction Impacts in San Diego Creek Flood Control Channel, September 8, 1992
- Golf Course Water Quality Monitoring Program, Final Report November 1991
- Hydrologic, Hydraulic and Sediment Transportation Analysis, December 1990
- Drainage Plan for the SJHTC submitted to the California Coastal Commission, October 19, 1992
- Geotechnical/Materials Report, March 6, 1991
- Clarification of Information For Coastal Development Permit Application No. 5-92-232 Discussed at October 5, 1992, Meeting
- Supplement to SJHTC Biological Assessment for Cactus Wren and California Gnatcatcher, Oct. 16, 1992
- SJHTC Alternatives For Crossing San Diego Creek (received with cover letter from TCA dated October 29, 1992)

3. Coastal Commission's Adopted Interpretive Guidelines on Wetlands and Other Wet Environmentally Sensitive Habitat Areas, adopted February 4, 1981
4. Local Coastal Program Documents: Irvine Coast LCP; Newport Beach LUP
5. Coastal Commission Findings in certifying Newport Beach LUP, Marina Del Rey/Ballona LUP, Bolsa Chica LCP
6. Coastal Commission Findings on Consistency Certifications: CC-45-85, CC-41-89, CC-25-84, CC-30-91, CC-48-88, CC-29-87, CC-18-84, CC-25-84
7. Decision of Secretary of Commerce in Appeal of Southern Pacific, Santa Ynez River Bridge, railroad bridge crossing (CC-25-84)
8. Coastal Development Permit Actions by Commission: 4-82-605, 6-92-16, 5-89-724, Appeal No. 332-80
9. Corps of Engineers Public Notice/Application No. 92-522-BH

ATTACHMENT 2

CALIFORNIA COASTAL COMMISSION, FINDINGS FOR STATE ROUTE 56, 6-98-127 (CITY OF SAN DIEGO), ADOPTED MAY 10, 2000

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

3111 CAMINO DEL RIO NORTH, SUITE 200

SAN DIEGO, CA 92108-1725

(619) 521-8036

**Wed 14b**

Filed: September 24, 1999
49th Day: November 12, 1999
180th Day: March 22, 2000
270th Day: June 13, 2000
Staff: EL-SD
Staff Report: April 25, 2000
Hearing Date: May 9-12, 2000

REGULAR CALENDAR
STAFF REPORT AND PRELIMINARY RECOMMENDATION

Application No.: 6-98-127

Applicant: City of San Diego

Agent: Frank Belock

Description: Construction of the middle segment of State Route 56 to complete an east-west freeway connection between I-5 and I-15, with approximately 7,000 linear feet of the highway in the coastal zone (approximately 5,200 linear feet in the Coastal Commission's jurisdiction and subject to this permit). The project includes approximately 200,000 cu.yds. of grading in the coastal zone (approximately 175,000 cu.yds. in the Coastal Commission's jurisdiction and subject to this permit) and construction of four travel lanes, bicycle lanes and a bridge at the future interchange at Camino Santa Fe. The project also includes installation of two Continuous Deflective Separation Units on existing State Route 56 West and creation of 1.5 acres of riparian wetlands in McGonigle Canyon as mitigation for project impacts to 0.427 acres of existing southern willow scrub.

Site: Beginning approximately 1/3 mile east of the east end of existing State Route 56, extending east approximately 1 mile through Subarea III of the Future Urbanizing Area of North City, San Diego, San Diego County.

STAFF NOTES:Summary of Staff's Preliminary Recommendation:

Staff recommends approval of the proposed freeway link, which completes a connection between Interstate 5 (I-5) and Interstate 15 (I-15). Although the proposed alignment for State Route (SR) 56 within the coastal zone will result in permanent impacts to 0.427 acres of riparian wetlands, and approximately two acres of various sensitive upland habitats, on balance the project is most protective of coastal resources, since it will result in improved water quality as compared to existing conditions. The project also has positive benefits in the areas of providing safe wildlife corridors, clustering future development north of the proposed alignment leaving a large contiguous area of open

space south of the alignment, and facilitating future mass/alternative transit and access from inland communities to the beach. Moreover, all unavoidable project impacts are being mitigated and the proposal represents the least environmentally damaging alternative consistent with Coastal Act policies.

Staff recommends a number of special conditions designed to assure adequate and appropriate mitigation for all project impacts and provision of water quality improvements. As conditioned, the project will include erosion control and drainage measures for the proposed middle segment of SR-56. As proposed, the project will also include retrofitting the existing western segment of SR-56 with additional drainage improvements. In addition, the conditions require monitoring of the installed drainage devices and identification and implementation of remediation measures if standards established by the Regional Water Quality Control Board (RWQCB) for sediment or pollutant loads are exceeded.

This project was initially brought before the Commission in March, but the City requested a 90-day extension of time to continue working with staff on the condition language. Since that time, Commission staff has had numerous meetings and contacts with the City of San Diego and Caltrans to refine the special conditions that had been recommended in March, 2000. Resultant changes to several of the special conditions in no way reduce the level of protection required in this permit. However, changes have been made to address procedural requirements of Caltrans and to replace some forms of BMPs with other types that will achieve the same purpose. Since the applicant has not yet prepared construction plans, the Commission is the first state agency to formally review the recommended temporary and permanent erosion control measures and other water quality improvements. However, none of the recommended requirements of this permit should be inconsistent with, or in conflict with, the standards and requirements of other agencies, such as the Regional Water Quality Control Board.

First, Caltrans objected to a requirement that it identify temporary erosion control measures and project staging areas prior to issuance of the permit. Caltrans stated that these tasks are normally handled by the selected contractor, who is better able to determine the best erosion control measures and needed staging areas in the field. Under Caltrans required bidding process, the permit must be approved and issued before the project can go out to bid. To accommodate this concern, recommended Special Conditions #4 and #7 have been revised to require identification of the temporary erosion control measures and staging areas prior to the start of construction, rather than prior to issuance of the permit. The applicant must still acknowledge, prior to issuance of the permit, that staging areas cannot be located in sensitive areas.

In addition, recommended Special Condition #5 has been modified from the prior staff recommendation. With respect to specific permanent BMPs addressing water quality protection, the previously-recommended requirements for a grassy swale in the median and a detention basin at or near the western end of the project have been removed. Based on the submitted concept plan for a section of SR 56 (Exhibit #4), it appeared the entire median would be paved. However, the actual proposal is to only pave the center 5 feet of

a 75-foot median to provide a low flow channel; the remaining 70 feet are proposed to be vegetated. Moreover, where site gradients are less than 2%, permeable gravel will be used in place of concrete, and the majority of the highway is designed to drain to the outside, rather than to the median. In addition, staff has revised the special condition such that the requirement for a detention basin has been eliminated as it is not necessary. There is an existing detention basin just ¼ mile to the west of the recommended location for a new detention basin; the existing basin was sized and designed to accommodate both runoff from the entire alignment of SR 56 and from a significant amount of planned urban development outside the coastal zone. However, the applicant is required to retain peak flow rates consistent with the existing detention facility and to monitor the quality of effluent before it enters the existing basin.

Also since this item was last scheduled for Commission review, a formal coastal zone boundary delineation was completed. Based on that delineation, slightly less of SR 56 is located within the coastal zone than was previously cited. This staff report has been updated to reflect the correct numbers with respect to linear feet and grading amounts in the coastal zone. However, updated information is not yet available for biological impacts. Thus, this report contains the same amount of identified impacts as the previous report contained, but it should be noted that these numbers will likely be slightly reduced once the final calculations are prepared. This will not change the overall mitigation program for the full development, since total impacts remain the same. There is just less impact within the coastal zone boundary.

Substantive File Documents: Certified City of San Diego Land Use Plans: North City LCP Land Use Plan Addendum, Carmel Valley Neighborhood 8 Community Plan, North City Future Urbanizing Area Framework Plan and Pacific Highlands Ranch Draft Subarea Plan (SDLCPA #3-98); Certified City of San Diego Implementation Plan; Final Environmental Impact Report (LDR No. 95-0099); CCC Files #6-90-123 and #1-98-103

PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

- I. **MOTION:** *I move that the Commission approve Coastal Development Permit No. 6-98-127 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a YES vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. Standard Conditions.

See attached page.

III. Special Conditions.

The permit is subject to the following conditions:

1. Final Plans. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval, final plans for the construction of those portions of the middle segment of State Route 56 located within the Coastal Commission's coastal development permit jurisdiction. The plans shall incorporate the following information:

- a. A site plan(s) showing the entire alignment within the coastal zone, with the coastal zone boundary clearly delineated;
- b. Grading plans for the entire alignment within the coastal zone, with existing and proposed contours clearly delineated;
- c. Elevations of all interchanges and under/over-crossings in the coastal zone;
- d. Descriptions and exhibits of all proposed landscaping improvements within the coastal zone, as further detailed in Special Condition #6; and
- e. Descriptions and exhibits showing the placement and composition of all proposed permanent drainage facilities, as further detailed in Special Condition #5.

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without an amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

2. Revised/Final Mitigation and Monitoring Plan/Program. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for the review and written approval of the Executive Director, a final enhancement and monitoring plan designed by a qualified wetland biologist and acceptable to the U.S. Army Corps of Engineers (ACOE), U.S. Fish and Wildlife Service (Service) and the California Department of Fish and Game (CDFG). Said program shall be in substantial conformance with those portions of the plan identified as *Conceptual Habitat Restoration and Monitoring Program for Wetlands Mitigation Associated with the State Route 56 Construction Project* (KEA Environmental, Inc., October 14, 1999) applicable to the Lower McGonigle Canyon mitigation area only, but shall be revised to include the following:

- a. A detailed planting plan for the Lower McGonigle Canyon mitigation site (identified in Exhibit #7), similar in content and design to the plan depicted in Figure 10 of the above-referenced document. The plan shall consist of in-kind riparian mitigation at a ratio of 3:1 (i.e., three acres created for every acre impacted within the coastal zone).
- b. A detailed narrative description of the Lower McGonigle Canyon mitigation project, similar to Sections C and D of the above-referenced document.
- c. Submittal, within six weeks of completion of construction (i.e., planting) at the mitigation site, of an as-built assessment of the mitigation project that includes as-built plans, to determine if the project has been built as approved.
- d. Submittal of annual monitoring reports to the Executive Director of the Coastal Commission, as well as any other required recipients.

The permittee shall undertake mitigation and monitoring in accordance with the approved program prior to, or concurrent with, the occurrence of the subject wetland impacts. Any proposed changes to the approved program shall be reported to the Executive Director. No changes to the approved program shall occur without an amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

3. Open Space Deed Restriction. No development, as defined in Section 30106 of the Coastal Act shall occur within the Lower McGonigle Canyon wetland mitigation site consisting of restored wetlands and a minimum 50-foot wetland buffer between wetland and upland habitats, as shown in the approved plan required by Special Condition #2 above, except for restoration, monitoring and maintenance activities conducted in accordance with the approved mitigation and monitoring program.

PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall execute and record a deed restriction in a form and content acceptable to the Executive Director, reflecting the above restriction on development in the designated

open space. The deed restriction shall include legal descriptions of both the applicant's entire parcel and the open space area. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Coastal Commission-approved amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

4. Grading/Erosion Control. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION, the applicants shall submit to the Executive Director for review and written approval, final erosion control plans that have been approved by the City of San Diego and Caltrans. The approved plans shall be subject to the following requirements and include the following components:

- a. During construction, erosion on the site shall be controlled to avoid adverse impacts to adjacent properties, public roadways and Los Penasquitos Lagoon.
- b. The following temporary erosion control measures shall be used during construction activity: a combination of temporary measures (e.g., geo-fabric blankets, spray tackifiers, silt fences, fiber rolls, straw mulch, hay bales, gravel bags), as appropriate, during each phase of site preparation, grading and project construction.
- c. Following construction, erosion on the site shall be controlled to avoid adverse impacts on adjacent properties, public roadways and Los Penasquitos Lagoon.
- d. A copy of the Storm Water Pollution Prevention Plan (SWPPP), prepared as a requirement for development under Caltrans individual NPDES permit, which specifies BMPs appropriate for use during each phase of site preparation, grading and project construction, and procedures for their installation, based on soil loss calculations. The submitted calculations will account for factors such as soil conditions, hydrology (drainage flows), topography, slope gradients, vegetation cover and groundwater elevations.
- e. A site plan showing the location of all temporary erosion control measures. Such site plan may acknowledge that minor adjustments in the location of temporary erosion control measures may occur if necessary to protect downstream resources.
- f. A site plan showing the location of all permanent erosion control measures.
- g. A schedule for installation and maintenance of the permanent erosion control measures.
- h. A plan to mobilize crews, equipment, and staging areas for BMP installation during each phase of site preparation, grading and project construction, with timing of deployment based on the forecast percentage of rainfall occurrence. The plan

shall also address provisions for delivery of erosion prevention/control materials, or access to onsite supplies, including unit costs and specifications for adequate storage capabilities.

- i. A plan for landscaping, which shall be installed on all cut and fill slopes prior to November 15th of each year utilizing either temporary or permanent (in the case of finished slopes) erosion control methods. Said planting shall be accomplished under the supervision of a licensed landscape architect, shall provide adequate coverage within 90 days, and shall utilize vegetation of species compatible with surrounding native vegetation, subject to Executive Director approval.
- j. Limitations on grading activities during the rainy season, from November 15 to March 31 of each year, wherein grading may only occur in increments as determined by the City Engineer and in conformance with the updated Land Development Code of the City of San Diego, effective January 1, 2000. Prior to commencement of any grading activity, the permittee shall submit a grading schedule to the Executive Director. Any variation from the schedule shall be promptly reported to the Executive Director.
- k. A requirement that all permanent runoff and erosion control devices shall be developed and installed prior to or concurrent with any on-site grading activities. All areas disturbed, but not completed, during the construction season, including graded pads, shall be stabilized in advance of the rainy season.

The permittee shall undertake development in accordance with the approved grading and erosion control plans. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is required. To facilitate this determination, the third-party contractor designated by Caltrans shall evaluate the implementation of SWPPP measures for compliance with this coastal development permit, and copies of all periodic reports shall be submitted to the Executive Director for review.

5. Drainage and Polluted Runoff Control Plan. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit for the review and written approval of the Executive Director, a final drainage and polluted runoff control plan for existing and proposed SR 56, designed to minimize the volume, velocity and pollutant load of stormwater leaving the developed site. The plan shall be incorporated into construction bid documents and reviewed and approved by the consulting engineer to ensure the plan is in conformance with the engineer's recommendations. The plan shall be subject to the following requirements, and shall include the following components:

- a. Post-development peak runoff rate and average volume from the Carmel Valley Resource Enhancement Plan (CVREP) detention facility to Carmel Creek/Los Penasquitos Lagoon shall be maintained at levels similar to existing conditions.

b. Permanent structural or non-structural treatment control best management practices (BMPs) effective at removing and/or mitigating pollutants of concern, specifically, petroleum hydrocarbons, heavy metals, sediment and particulates (for example bioswales or continuous deflection separators fitted with sorbent pads) shall be incorporated into final plans, to treat the drainage from the proposed highway segment located within the coastal zone.

c. Opportunities for directing runoff from impervious roadway to permeable areas for infiltration or biofiltration purposes shall be maximized where geotechnical or hydrological constraints would not otherwise prohibit such use.

d. Permeable crushed gravel shall be used as an alternative to the proposed concrete material, to form the low flow channel proposed for the middle five feet of the center median, on all portions of the proposed segment where slopes are of a grade less than 2%. All portions of the median outside the center five feet shall be vegetated.

e. All selected structural BMPs for volumetric control (e.g., detention and infiltration basins) and flow-based control (e.g., biofilters and media filters) shall be designed and constructed in accordance with the sizing and design criteria contained in the California Storm Water Best Management Practices Handbook (Municipal) (1993) and/or comparable Caltrans criteria, appropriate for the San Diego region. The final BMP design standard shall be to reduce pollutants in stormwater to the maximum extent practicable (MEP). MEP should represent the point of diminishing return for BMP implementation. If, based on such considerations and specifications, with respect to site characteristics, a required BMP is determined by a qualified engineer with appropriate expertise to be infeasible, and will therefore result in changes to the approved plan, a Commission-approved amendment will be required, unless the Executive Director determines that no such amendment is required.

f. A BMP maintenance agreement which states that by acceptance of this coastal development permit, the applicant/owner or successor in interest agrees to be solely responsible for regular maintenance including inspection and regular cleaning of all approved BMPs to ensure their effectiveness prior to and during each rainy season from November 15 through March 31 of each year, for the life of the project. Debris and other water pollutants contained in BMP filters or devices must be contained and disposed of in a proper manner on a regular basis. All BMP traps/separators and/or filters must be cleaned prior to the start of the winter storm season, no later than October 15th each year. Documentation of inspection and maintenance activity is required in the annual monitoring and BMP status report, required by component 5g below.

g. As proposed by the applicant, a comprehensive receiving water quality monitoring program shall be implemented beginning in the Fall of 2000. Sampling locations and conditions shall be consistent with the specifications of the proposed State Route 56 Monitoring plan (Exhibit #11). Samples shall be analyzed for all constituents included in Table 1 of the State Route 56 Monitoring Plan. However,

the plan as proposed shall be modified to reflect that monitoring shall be conducted for a period of five years following final completion of the project. In addition, a BMP efficiency study designed to assess the efficacy of selected permanent BMPs required by 5.b. of this permit shall be undertaken. Evaluation and criteria for assessment of BMP efficacy shall be modeled after that used by Caltrans in BMP retrofit pilot plan studies conducted on BMPs implemented elsewhere in the state. The results of the monitoring plan, BMP assessment, and documentation of inspection and maintenance activities shall be compiled in the form of an Annual Monitoring and BMP Status Report, referred to hereafter as the "Status Report." The Status Report shall be submitted to the Coastal Commission, prior to June 1st of each year, for a period of five years following final project completion. A complete Status Report shall consist of the following three components:

1. The sampling data and analysis of results from the previous year's monitoring efforts. Analysis shall serve to characterize water quality in the receiving waters, and evaluate results against receiving water quality objectives established by the Regional Water Quality Control Board (RWQCB), and in comparison to baseline data from monitoring efforts conducted in previous years associated with the CVREP.
2. BMP efficiency study results for selected permanent BMPs implemented per Special Condition 5.b. of this permit.
3. Documentation of inspection and maintenance activities associated with permanent BMPs. Specific information shall include: date, location and brief description of activity performed.

The Status Report shall be signed by the Caltrans District 11 Director, or the Director's designee in the stormwater compliance program, prior to annual submittal to the Commission.

h. A list of, and a commitment to implement, potential remediation measures in the event runoff from the project site or downstream sampling points exceeds criteria pollutant thresholds regulated by the RWQCB at this time, or for which standards are developed during the 5-year term of this monitoring program. Corrective actions for exceedances should be provided immediately wherever possible, with considerations for worker safety. Where exceedances cannot be corrected immediately, the next annual report shall identify specific remediation measures appropriate to the circumstances and provide a schedule for their implementation.

i. A detailed site plan that shows the size and location of all storm drain inlets, size and location of all structural and non-structural BMPs, detention/desilting facilities and all locations where testing/monitoring will occur. In addition, the program, and associated site plan, shall identify the locations along existing State Route 56 where the applicant is proposing installation of Continuous Deflective Separation Units as a retrofit water quality improvement.

The permittee shall undertake the development in accordance with the approved plan. Any proposed changes to the approved plan shall be reported to the Executive Director. No change to the plan shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is required.

6. Landscaping Plan. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit for review and written approval of the Executive Director, a detailed final landscape plan approved by the City of San Diego and Caltrans indicating the type, size, extent and location of all plant materials, including the specific species to be planted in all areas of the median except the center five feet, where a low-flow channel is proposed, any proposed temporary irrigation system and other landscape features. The plan shall be incorporated into construction bid documents and reviewed in consultation with the resource agencies identified below and shall include the following specific features:

- a. Only drought tolerant, non-invasive native plant materials acceptable to the California Department of Fish and Game (CDFG), U.S. Fish and Wildlife Service (Service) and U.S. Army Corps of Engineers (Corps) shall be utilized, except in the western-most portion of the alignment where SR 56 will be adjacent to existing residential uses on both the north and south sides of the highway, where drought tolerant, non-invasive native or exotic plant materials shall be permitted;
- b. Only temporary irrigation for plant establishment shall be permitted, except in the area described in 6.a. above, where permanent irrigation shall be permitted. Reclaimed water shall be used for irrigation to the maximum extent possible, when available;
- c. A written commitment shall be made that all planted materials shall be maintained in good growing condition;
- d. Use of fertilizers and pesticides which may enter surface runoff or leach into groundwater shall be avoided altogether, where possible, and otherwise minimized to the extent feasible; and
- e. Permanent landscaping shall be installed concurrent with, or within sixty days following, completion of highway construction.

The permittee shall undertake development in accordance with the approved final landscaping plan. Any proposed changes to the approved landscaping plans shall be reported to the Executive Director. No changes to the approved landscaping plans shall occur without an amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

7. Construction Staging and Storage Areas. The permittee shall not use any area containing wetlands or sensitive upland plant species (i.e., coastal sage scrub, etc.) to

stage or store construction equipment or materials. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit a written agreement incorporating the above requirement.

PRIOR TO THE COMMENCEMENT OF CONSTRUCTION, the permittee shall submit plans showing the locations, both on- and off-site, which will be used as staging and storage areas for materials and equipment during the construction phase of this project. The staging/storage plan shall be subject to review and written approval of the Executive Director. The plan shall demonstrate that no area containing wetlands or sensitive upland plant species (i.e., coastal sage scrub, etc.) is proposed to stage or store construction equipment or materials.

The permittee shall undertake development in accordance with the approved final staging and storage area plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the approved plans shall occur without an amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

8. Other Permits. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for review and written approval of the Executive Director, copies of all other required local, state or federal discretionary permits for the development herein approved. Any mitigation measures or other changes to the project required through said permits shall be reported to the Executive Director and shall become part of the project. Such modifications, if any, may require an amendment to this permit or a separate coastal development permit.

9. Future Development. The subject permit is for the construction of four travel lanes and associated improvements only. The construction of additional travel lanes or other improvements within the reserved median in the future will require review by the Coastal Commission as an amendment to this permit. The first priority for use of the reserved median area should be for mass transit or HOV lanes, rather than additional mixed-use lanes. If additional mixed-use lanes are ultimately proposed for the center median, the amendment application should include a thorough analysis of transit alternatives and support why such improvements are not proposed or needed.

IV. Findings and Declarations.

The Commission finds and declares as follows:

1. Detailed Project Description/History. The City of San Diego is proposing construction of the middle segment of State Route 56 (SR-56), a major east-west freeway connector between Interstate 5 (I-5) and Interstate 15 (I-15). The total proposed middle segment is approximately 5 miles long, with about 1.25 miles (approximately 7,000 linear feet) of the alignment in the coastal zone. Of the 1.25 miles in the coastal zone, approximately 1 mile (approximately 5,200 linear feet) is in an area of deferred certification (the North City Future Urbanizing Area), where the Coastal Commission

retains permit authority and the standard of review is Chapter 3 of the Coastal Act. The Commission recently certified City of San Diego Local Coastal Program Amendment #3-98, which included a land use plan for Subarea III of the Future Urbanizing Area. The proposed freeway alignment is within Subarea III. However, the LCP amendment has not yet been effectively certified. Therefore, development within Subarea III remains within the Commission's jurisdiction. The land use plan for Subarea III indicates that some wetland impacts would occur in conjunction with the extension of SR-56 through the community. The remaining approximately ¼ mile of the middle segment of SR-56 is in the City's permit jurisdiction, in Neighborhood 8 of the Carmel Valley Community Plan. The City has already issued a coastal development permit for this portion of the proposed road.

A portion of the eastern segment of SR-56, which is not in the coastal zone, trends westward from I-15 and has been in place for some time. Likewise, the western segment, which is entirely within the coastal zone, was constructed several years ago pursuant to Coastal Development Permit #6-90-123. The existing western segment extends for approximately two miles eastward from I-5, roughly along the historic alignment of Carmel Valley Road. The existing western segment ends within the City's permit jurisdiction, and it is the westernmost portion of the proposed middle segment which the City has recently approved under its permit authority.

As proposed, the portion of SR-56 addressed in this application is situated along the northern extent of the coastal zone boundary such that in places only a part of the full width of the proposed freeway is actually in the coastal zone. Exhibit #2 delineates the various jurisdictional boundaries and depicts those portions of the proposal which are actually within the Commission's permit jurisdiction.

The City is proposing to grade the entire proposed width of the freeway alignment (approximately 150 feet for most of the alignment, greater where grade separations are required for bridges, interchanges, etc.), but only construct four travel lanes (two eastbound, two westbound) at this time. These travel lanes will be located along the outer portion of the graded right-of-way, in conjunction with required shoulders, etc. The center median area (approx. 75 feet in width) will be retained for future expansion as the need arises. At present, the applicant's typical concept plan (depicting approximately one third of a mile of the proposed alignment) indicates the median will be improved with a concrete drainage channel; in recent discussions, the applicant has indicated that only the center 5 feet will be concrete, with the remainder vegetated. Depending on circumstances, the median is to be improved in the future with light rail transit, HOV lanes or additional mixed-use lanes. Special Condition #9 makes it clear that only four through travel lanes, and associated highway improvements, are approved at this time. Future expansion into the reserved median will require additional review by the Coastal Commission as an amendment to this permit. At that time, priority should be given to mass transit improvements. If additional mixed-use lanes are ultimately proposed for the center median, the amendment application should include a thorough analysis of transit alternatives and support why such improvements are not proposed or needed.

At this time, full construction drawings for the highway improvements have not been prepared. Large scale (approx. 1" = 500') site plans showing the full coastal zone road alignment and grading footprint have been submitted and are attached as Exhibits #2 and #3. In addition, a typical detailed plan of an approximately one-third mile portion of the proposed highway has been submitted as an example demonstrating the level of detail to be included in the final drawings. Special Condition #1 requires submittal of final, detailed plans for the entire portion of the alignment addressed in this permit. The final plans are to include site plans, grading plans, elevations of interchanges and over/under crossings, erosion control plans, drainage plans and landscaping plans. The final three types of plans are addressed in greater detail in separate special conditions and in subsequent findings.

2. Environmentally Sensitive Habitats/Biological Resources. The proposed middle segment of SR-56 will result in impacts to several wetland and upland habitats, including impacts to riparian corridors, freshwater marshes, vernal pools, and coastal sage and chaparral communities. Most of these impacts occur outside the coastal zone. However, the proposed development will result in permanent impacts to 0.427 acres of riparian vegetation (southern willow scrub) and to approximately 1.5 acres of sensitive upland habitats within the coastal zone. The applicable Coastal Act policies are cited below, and state in part:

Section 30231.

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30233.

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long shore current systems.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

Section 30240.

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The project is located primarily in undeveloped areas of the northern portion of the City of San Diego, although it will be adjacent to existing residential uses at the western end. The surrounding areas, particularly those located north of the proposed highway alignment and thus outside the coastal zone, are designated in the Subarea III land use plan for development with a variety of uses in the future. However, at present, most of the land consists of undeveloped sloping terrain, steep in places, and several canyons, some of which include seasonal or permanent streams.

The proposed project raises issues under all the above-cited Coastal Act policies. Both during construction and by the increase in impermeable surfaces after construction, the proposed development will generate a high volume of runoff that will cause erosion, which in turn will lead to adverse impacts on downstream and adjacent biological resources. The project includes a number of temporary and permanent erosion control and drainage improvements intended to mitigate the impacts of construction and operation. These issues are more significantly related to water quality, and will be addressed in greater detail in a subsequent section of these findings. This finding will address the project's direct and permanent impacts on biological resources, including both wetlands and uplands.

The proposed project's impacts to wetlands will occur to an isolated drainage containing southern willow scrub riparian wetlands near the western end of the proposed middle segment. The existing western segment of SR-56, approved by the Coastal Commission ten years ago in Coastal Development Permit #6-90-123, was constructed in close proximity (contiguous in places) to the previously-existing east/west trending Carmel Valley Road. Carmel Creek flows in a westerly direction south of both Carmel Valley Road and existing SR 56, eventually emptying into Los Penasquitos Lagoon. In the area of the proposed middle segment, Carmel Valley Road veers away from the proposed SR-56 alignment and trends to the northeast, whereas Carmel Creek continues to flow from the east. A minor tributary to Carmel Creek, in the form of a three-foot-wide streambed and grove of riparian vegetation, follows alongside that northeasterly-trending section of Carmel Valley Road. The stream does not flow year-round, and was dry during a recent site visit; the existing riparian vegetation, though somewhat sparse, grows over and into the streambed as well as on its banks such that the entire drainage area is a wetland. The Commission's staff ecologist has visited the site and concluded it is correctly identified as a wetland. The intermittent stream and grove of riparian vegetation is surrounded by paved roads on three sides, consisting of Carmel Valley Road to the west and north, as it curves, and a private driveway leading to existing and permitted residential, commercial and agricultural uses to the south, and by open grasslands to the east. The proposed middle segment of SR-56 will cross over existing Carmel Valley Road; the proposed cross-over will result in impacts to 0.427 acres of the above-described riparian corridor within the coastal zone through the placement of fill to support the highway.

Under Section 30233 of the Coastal Act, disturbance and/or fill of wetlands is severely constrained. Coastal Act Section 30233(a) sets forth a three-part test for all projects involving the fill of coastal waters and wetlands. These are:

- 1) That the project is limited to one of the eight stated allowable uses;
- 2) That the project has no feasible less environmentally damaging alternative;
- and,
- 3) That adequate mitigation measures have been provided to minimize adverse environmental effects.

In this particular case, the proposed development does not meet the above requirements in that it is not a permitted use pursuant to Section 30233. The proposed road alignment does, however, represent the least environmentally damaging alternative. The City and the public have reviewed many different alignments of the proposed middle segment of SR-56. The original EIR analyzed four potential alignments in significant detail and several others to lesser degree; as a result of public review of that document, six additional potential alignments were identified and also analyzed in a subsequent final EIR, with specific attention given to the central alignment and three variations of the northern alignment. Various alignments identified different quantities of impact to various resources, but all the alignments had some level of impacts to every identified resource. Most of the differences between the amount of impacts occur outside the coastal zone and affect upland habitats, areas where the highway will cross other riparian corridors and vernal pool habitat near the far eastern end of the proposed middle segment. Exhibits #9 and #10 delineate several of the many alignments analyzed over the past several years. The exhibits, especially Exhibit #10, are difficult to read, but are presented to support this narrative and demonstrate the wide range of options considered by the City and the public before it was determined that the proposed alternative was the least environmentally damaging overall.

The proposed alignment, which is a combination of the "Modified Northern F" alignment on the western part and the "Northern" alignment on the eastern part, represents the least total amount of impacts on wetlands, although it does include greater impacts on some upland habitats than some of the other reviewed alignments. Overall, however, it is preferred since it will create a distinct boundary between future urban development, which will be located north of SR 56, and open space areas south of the proposed highway, rather than significantly encroaching upon and fragmenting existing open space/habitat areas. All other identified alternatives would fragment open space areas to greater degree than the preferred alignment.

For the proposed, preferred alignment, the only coastal zone wetland impact is near the western end of the proposed highway. That impact is common to all alternatives for two reasons: 1) any alignment near the western end is fixed by existing adjacent residential development and the existing western segment of SR 56, and 2) any east-west trending highway alignment must cross the north-south trending Carmel Valley Road and adjacent tributary creek where the riparian vegetation exists.

In addition, full mitigation is proposed for all identified impacts, both to wetlands and uplands. Impacts to 0.427 acre of southern willow scrub are proposed to be mitigated at a 3:1 ratio through the creation of 1.5 acres of new riparian habitat at the western end of McGonigle Canyon. While the chosen mitigation site is not immediately adjacent to the exact area of impact, it is located nearby the highway alignment of SR-56, upstream and within the same watershed, and within the coastal zone (see Exhibit #7). The applicant submitted a draft mitigation program addressing project impacts. The program is not final yet for coastal zone impacts, but it is complete for impacts occurring further east outside the coastal zone, where highway construction is already underway. The goals, performance standards, implementation methods and monitoring requirements for these impacts are consistent with programs the Commission has reviewed and approved for other projects in the past. The plan identifies responsible parties and requires annual reports throughout the monitoring period. Thus, Special Condition #2 requires the applicant to submit a final mitigation plan for all project impacts to wetlands within the coastal zone, that is in substantial conformance with the content and design of the submitted plan, but augmented to include specific maps and narrative addressing the coastal zone impacts. The condition stipulates the mitigation will occur at a 3:1 ratio and the selected site is within the coastal zone.

Three other special conditions also address the project in relation to biological resource protection. Special Condition #3 requires that the mitigation area be preserved in perpetuity as open space. Special Condition #7 further protects both wetlands and uplands by providing that required construction staging and storage areas may not be located within any environmentally-sensitive habitat areas. Finally, Special Condition #8 requires submittal of all other required state and federal permits for the subject development. The City has applied to the ACOE and CDFG for permits, and has received authorization to proceed with construction of the eastern portions of the highway located well outside the coastal zone. Most of the impacts to federal jurisdiction lands occur to vernal pools located in the eastern part of the middle segment outside the coastal zone; the ACOE has issued a permit for just that portion, which allows the applicant to begin construction at the eastern end of the middle segment, proceeding towards the west.

Although the applicant is proposing the least-environmentally damaging project alternative, and has proposed appropriate and adequate mitigation for all unavoidable impacts, the proposed development, construction of a freeway segment, is not one of the eight allowed uses in wetlands pursuant to Section 30233 of the Coastal Act. The proposed project represents a major east-west highway linkage between two existing segments of SR-56 and ultimately between I-5 and I-15. It has been identified in regional and community planning documents for more than two decades, and only a small portion of the middle segment occurs within the Coastal Commission's jurisdiction (approximately 1 mile out of 5 miles total). However, although wetland impacts have been avoided to the extent feasible, and full mitigation is proposed, 0.427 acres of existing riparian habitat (southern willow scrub) will still be permanently impacted by the construction of the proposed new highway segment. This development is not consistent with Section 30233 of the Coastal Act, which does not allow fill of wetlands for new

roadways. However, as described in more detail below, the Commission finds that there is a conflict between the provisions of Section 30233 and other Coastal Act policies and that the proposed development, on balance, provides a greater benefit to coastal resources than is provided by existing conditions.

As previously identified, the proposed development will also impact sensitive upland plant communities, namely coastal sage and chaparral. Within the coastal zone, impacts will occur to 1.34 acres of Diegan coastal sage scrub and coyote bush scrub combined and to 0.18 acres of scrub oak chaparral. In addition, the project will impact more than ½ acre (0.64 acre) of non-native grasslands within the coastal zone. Coastal sage scrub, coyote bush scrub and scrub oak chaparral are considered sensitive upland plants because, in some areas, they provide habitat for threatened or endangered species such as the gnatcatcher. However, in this case, the 1.52 acres containing these plants do not qualify as Environmentally Sensitive Habitat Area (ESHA) within the meaning of Section 30240 of the Act. The areas in question are small fragmented patches of native vegetation interspersed with non-natives, and are located along the outer fringes of undeveloped lands nearby areas approved for future urban development. The resource agencies have accepted the development of these areas during their review and designation of appropriate Multi-Habitat Planning Area (MHPA) lands, primarily because the proposed, preferred highway alignment skirts the northern edge of the MHPA, preserving large contiguous areas of high quality upland habitat. The MHPA consists of an interconnected regional system of open space preserves including those lands determined to contain the highest value habitats. Given the location, fragmentation and disturbed quality of the areas that will be affected by the proposed development, the Coastal Commission concludes that they are not ESHA.

However, because these areas do contain sensitive plant species, the applicant proposes to mitigate the loss of these plants, along with significantly greater impacts to these and other upland habitats occurring outside the coastal zone (well over 200 acres of impact total) through acquisition and/or restoration of private lands within the delineated MHPA. Acquisition will retire development rights on these properties and all acquired mitigation areas will be placed in dedicated open space or encumbered with a conservation easement or a covenant of easement.

The City's new Land Development Code (LDC) established mitigation ratios for various upland habitats, based on whether the impacts and the mitigation occur inside or outside the MHPA. Although the LDC was not effective in the coastal zone at the time the City issued its coastal development permit for the westernmost portion of the middle segment of SR 56, it became effective in the coastal zone on January 1st of this year. The Commission has certified this document as consistent with the City's certified land use plans and thus with the Coastal Act. The Coastal Act is the standard of review for Commission-issued permits. The Commission does not have any pre-established or historic mitigation ratios for these types of upland habitats, and the LDC parameters, which have been accepted by the California Department of Fish and Game and the U.S. Fish and Wildlife Service pursuant to their approval of the Multiple Species Conservation Plan, provide a reasonable program for mitigation.

Within the Coastal Commission's jurisdiction, impacts to coastal sage and chaparral habitats will occur outside the MHPA and impacts to non-native grasslands occur both within and outside the MHPA. These areas are not ESHA within the meaning of Section 30240 of the Coastal Act. The proposed upland mitigation, which consists of acquisition of lands within the MHPA preserve, is fully consistent with the LDC parameters/ratios and has been accepted by the other resource agencies. Therefore, the Commission finds that upland impacts, which do not occur in ESHA, are appropriately and adequately mitigated and the project can be found consistent with Section 30240 in this regard.

Several aspects of proposed SR 56 will benefit biological resources. Proposed SR 56 will include overcrossings of two major canyons (Gonzalez and McGonigle) which are now traversed by at-grade roads, some paved and some unpaved. Once the subject road segment is constructed, the need for these roads to provide a connection between I-5 and I-15 will be eliminated, and it is expected that actual use of these roads will sharply decline. The canyons provide corridors for wildlife movement between Los Penasquitos Canyon Preserve and the San Dieguito River Valley, and ultimately with habitat areas further east, and likewise all the way west to Los Penasquitos and San Dieguito Lagoons. Due to the significant development which has occurred in the northeastern part of San Diego, these roads, included the unpaved ones, are heavily traveled to save time and distance in reaching I-5 and communities to the west. This has resulted in much death and injury to wildlife attempting to cross these streets to move between habitat areas fragmented by the current informal road system. The project will provide a significant benefit to wildlife by crossing these canyons with bridges and thus allowing free movement of wildlife underneath. Although this benefit occurs primarily outside the coastal zone, the improved wildlife corridors connect to resources within the coastal zone, primarily Los Penasquitos Canyon and Lagoon and San Dieguito Lagoon. Thus, the project provides additional mitigation for the overall impacts of the project on upland habitats, both in and outside the coastal zone.

In summary, the proposed middle segment of SR 56 will result in impacts to wetland and upland habitats, both within and outside the coastal zone. Within the coastal zone, the project will impact 0.427 acres of riparian wetlands and approximately one and a half acres of upland habitats. The project includes mitigation for all these impacts, and the Commission finds the impacts to upland habitats, as mitigated, consistent with the intent of Coastal Act policies. However, the Commission cannot find the proposed wetland impacts consistent with Section 30233 of the Coastal Act.

3. Water Quality. The project site is well inland of I-5, but the proposed roadway will be located within the Los Penasquitos Lagoon watershed. Portions of the road will also be adjacent to Carmel Creek and/or to other creeks or streams which ultimately feed into the lagoon. Potential runoff both during and post-construction raises concerns over the degradation of water quality. Such runoff can carry significant amounts of both sediments and urban pollutants and deposit these materials in downstream sensitive receiving waters. The following Coastal Act policy is most applicable to this issue:

Section 30231

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

In California, the Regional Water Quality Control Boards (RWQCB) are generally responsible for administering the water pollution control permit programs set up under the state Porter-Cologne Water Quality Act and the federal Clean Water Act. Locally, the *Water Quality Control Plan for the San Diego Basin* has established water quality objectives necessary for achieving its identified beneficial uses for surface waters. Both the City of San Diego and Caltrans have National Pollutant Discharge Elimination System (NPDES) permits under which they construct and operate development. These permits require that all discharges to surface waters meet the standards established in the *Water Quality Control Plan for the San Diego Basin*; the NPDES permits identify the Best Management Practices (BMPs) that can be used to meet these standards.

The proposed freeway segment will result in an increase in impermeable surfaces and thus increase the amount and velocity of stormwater runoff. Use of the coastal zone portions of the freeway for an anticipated 100,000 average daily trips within the first few years (and increasing steadily thereafter) will result in the deposition of a significant amount of vehicular pollutants (oils, fuels, tire residue, etc.) along the road which will become part of the stormwater runoff. In addition, the construction activities will result in an increased likelihood of sedimentation to downstream resources. Grading in the coastal zone will create approximately 7,000 linear feet of freeway, approximately 150 feet in width, resulting in a large area of temporarily exposed soil. Of this total, approximately 5,200 linear feet of freeway are in the Coastal Commission's jurisdiction and addressed in this permit; the remainder was already permitted by the City in its area of permit jurisdiction. Moreover, the construction equipment itself will produce much the same vehicular-related pollutants as will the future freeway traffic.

Downstream resources include Carmel Creek, the Carmel Valley Resource Enhancement Program (CVREP) area and Los Penasquitos Lagoon, which has been declared an impaired water body due to sedimentation from upstream developments. When the western segment of SR-56 was constructed a few years ago, CVREP was the mitigation component for the entire I-5/SR-56 project. It was intended primarily to allow 100-year flood flows in Carmel Creek at non-erosive velocities and establish a healthy riparian corridor through the valley. In addition to flood control function, the CVREP was designed to trap sediment, thereby reducing sediment loads in the creek and ultimately Los Penasquitos Lagoon. CVREP consists of a significantly widened channel for historic Carmel Creek (ranging from 100 to 300 feet in width), a series of drop structures along

the streambed, a detention basin at the western end of the improvements and an intense riparian revegetation program; it occupies the area of Carmel Valley between I-5 on the west and Carmel Country Road on the east. CVREP has been in place now for several years, and the detention basin at its western end has been cleaned out once, at the behest of the RWQCB; approximately 5,000 cu.yds. of sediments were removed.

The Commission finds that while sediment is a primary pollutant of concern in this watershed, other pollutants such as petroleum hydrocarbons and heavy metals are associated with highway runoff. These pollutants can have adverse impacts on coastal resources when cumulative. Although there is no formal testing program for these pollutants, a representative of the California Department of Parks and Recreation, which owns and manages the lagoon, stated that oil slicks are often visible in the upper lagoon areas adjacent to I-5, and just downstream of existing SR 56, after storm events. Therefore, in order to minimize the potential for adverse impacts on coastal resources as a result of stormwater runoff from the proposed development, Special Condition #5 requires the applicant to incorporate BMPs designed to treat, mitigate or remove pollutants of concern, specifically petroleum hydrocarbons, heavy metals, sediment and other particulates, in stormwater runoff from the proposed highway segment located in the coastal zone. The Commission finds that the incorporation of treatment control BMPs will serve to pre-treat stormwater runoff prior to entering the CVREP facility. The CVREP facility will then provide further mitigation for polluted runoff by settling out sediment. In addition, the CVREP contains vegetation which serves to filter runoff through biological uptake of some contaminants.

In this particular case, the middle segment of SR-56 will be constructed and operated under the Caltrans statewide NPDES permit. According to correspondence from the applicant, the City is responsible for constructing the eastern portion of the middle segment, outside the coastal zone. Caltrans will construct the western portion, including all areas within the coastal zone; this portion of the overall construction is not anticipated to begin for at least another year. The City of San Diego, as the applicant for the western portion, is required, under the terms of the Caltrans NPDES permit, to fully mitigate all water quality impacts directly attributable to the construction and operation of the middle segment of SR-56. Thus, the applicant is proposing a wide range of temporary and permanent erosion control devices and strategies intended to assure that runoff leaves the site at non-erosive velocities and in as clean a condition as at present.

Caltrans submitted a list and descriptions of the temporary and permanent BMPs they suggest for the middle segment of SR 56. The submitted material describes under what circumstances Caltrans would typically apply which BMP. It also provides the BMP's limitations, design guidance and expected maintenance requirements. Temporary (construction) BMPs proposed include silt fences, fiber rolls, check dams, sand/gravel bags, soil stabilization and temporary detention basins. The applicant also proposes to schedule construction activities in conjunction with installation of the proposed temporary BMPs. To date, no temporary erosion control plans incorporating these measures have been prepared for the proposed highway segment to demonstrate how these BMPs are typically deployed on the ground, and the final deployment of said

devices is generally left to the discretion of the contractor, who can better place, and possibly adjust, the devices based on actual conditions in the field during construction. Special Condition #4 requires submittal of a final erosion control plan prior to the start of any construction activity, that will clearly delineate all proposed temporary BMPs, provide for mobilization of personnel in the event of a major storm or other unforeseen circumstances and provide for planting of all slopes prior to November 15th of each year construction activities are ongoing.

With respect to permanent drainage facilities, the applicant is proposing to construct concrete ditches at the toe of fill slopes (which will be at a 1:3 slope angle on average) and bioswales at the top of cut slopes (which will be at a 1:2 slope angle on average), as needed/required. Pipe culverts under the new freeway segment will facilitate existing natural drainage patterns, and velocity dissipaters and flared culvert end sections will be installed at culvert entrances and exits. Slopes on both sides of the freeway will be planted, and an asphalt dike along the edge of pavement will direct roadway runoff away from the slopes. Permanent soil stabilization will be installed on slopes under the bridge deck over Gonzalez Creek, where shading prohibits plant growth. Also, the applicant proposes a paved low flow channel within the center five feet of the reserved, 75-foot wide median. The remainder of the median will be vegetated. Caltrans has submitted a drawing of a portion of the coastal zone alignment, as an example to demonstrate the typical placement and types of permanent drainage facilities to be installed within the middle segment of SR 56 (see Exhibit #4).

Staff has analyzed the proposed BMPs, particularly the permanent drainage facilities, and has identified concerns with the adequacy and appropriateness of some of the proposed structural improvements. Specific permanent BMPs proposed to date are designed primarily to control sediments, not remove hydrocarbons and other pollutants associated with automobiles. Both the applicant and Caltrans maintain that sedimentation, not contaminants, is the primary water quality problem identified in the Los Penasquitos watershed. Los Penasquitos Lagoon is identified by the RWQCB as an impaired water body; the City advises this is due to sediments, not pollutants. However, the City has indicated there is no current program to test for various forms of contaminants, either in the lagoon itself or upstream within CVREP.

With this in mind, it appears the proposed BMP program can be augmented, or various components replaced with other improvements, to address both sediments and the pollutants that can be expected in anticipated runoff from the proposed highway segment. Special Condition #5 addresses the proposed permanent project BMPs for the middle segment of SR 56. It requires submittal of a final BMP program that includes several components, including the following features: 1) devices to remove oil and grease; 2) vegetated cover over 70 feet of the 75-foot median; there will be a paved low flow channel down the center 5 feet of the reserved 75-foot median, but the use of permeable gravel is required where gradients are less than 2%; 3) monitoring of the BMPs to determine their efficacy; and 4) a water sampling and testing component with annual reporting requirements.

With respect to the oil/grease separators, there are a number of different products and methods available to achieve this BMP. In fact, the applicant has proposed one type of equipment as a retrofit measure for the existing western portion of SR 56. The applicant is proposing to install two Continuous Deflective Separation Units (CDS units), one at SR 56 and Carmel Creek Road and one at SR 56 and El Camino Real. The underground units create a vortex of water which deflects contaminants into a sump, where they are retained for later removal. The units are designed to handle 100% of the runoff in the tributary area, capture 95% of the gross pollutants and remove coarse sediments. They are designed to treat a one-year, 24-hour storm event and, as proposed, will require clean-out when the units are 85% full or when floating debris is 12 inches deep.

With respect to the median treatment, the Commission finds improving the 5-foot center of the median with gravel where gradients are less than 2% and pavement where gradients exceed 2% is acceptable in order to provide a low flow channel to facilitate drainage, recognizing that most highway runoff is directed to the outside of the highway rather than into the median. Moreover, vegetating the remaining 70 feet will allow most of the expected stormwater to percolate into the ground. It will also serve to reduce the overall velocity of water and will filter out pollutants of concern from whatever highway runoff actually enters the median. The vegetated area will also provide visual relief. Special Condition #6 (Landscaping) requires the applicant, among other things, to identify the species to be used for the required vegetative strip and to use only drought-tolerant, non-invasive plants. The use of such plants will minimize nuisance flows resulting from irrigation and reduce the need for excessive fertilizer and pesticides.

The Commission recognizes that the City proposes the wide center median to reserve adequate area for future highway expansion. Thus, it is possible the vegetation may be removed through some future amendment action approving light-rail transit or additional travel lanes in this location. At that time, the applicant would need to demonstrate how this particular pollution control function was being replaced in the context of an expanded highway. The provision of this vegetated area in most of the center median is only one component in a wide array of runoff and pollution control facilities. As technological advances occur, other BMPs may be discovered/invented which will adequately serve this function as part of an expanded freeway. However, the Commission finds that the potential that this particular BMP may not be in existence for the full life of the project does not diminish its value at this time.

The two CDS units proposed by the City as a retrofit to existing SR 56 are considered here as an example of one type of oil/grease filtering BMP. These specific units are relatively small in size, since they must be fit into an existing system where available space is a constraint. This should not be a limiting factor in the case of the new middle segment of SR 56, where the proposed alignment is surrounded by undeveloped open land. Whether the applicant proposes this same type of unit to comply with Special Condition #5, or selects a different type of device, the chosen BMPs must meet the performance parameters of the special condition.

In addition, there is an existing detention basin at the eastern end of the CVREP mitigation area. This detention basin was sized and designed to accommodate all flows generated by SR 56, as well as flows generated by future buildout of this portion of the City of San Diego. The areas north of proposed SR 56, part of Subarea 3 of the North City Future Urbanizing Area (Pacific Highlands Ranch), will be developed with residential and commercial uses and several schools. Nearly all the development area of Pacific Highlands Ranch is outside the coastal zone, and thus outside the purview of the Commission. However, opponents of the highway project have raised the issue that this future development will have significant adverse impacts on the resources of the coastal zone, since all runoff from this vast development area will eventually reach coastal streams and lagoons. Development of this area is dependent on having a viable circulation system in place, and the proposed middle segment of SR 56 will complete a major link in that system. Therefore, the Commission finds it entirely appropriate that downstream resources be protected by all possible means, and further finds that the existing CVREP detention basin serves this purpose.

In summary, the Commission finds that the proposed development will have significant adverse effects on downstream water quality. This will occur both because of the construction impacts of grading and massive landform alteration, and through the increase in impervious surfaces which will modify existing drainage patterns and increase the amount and velocity of runoff. Therefore, the Commission finds that Special Conditions #4, #5 and #6, which mitigate these adverse impacts as described above, are necessary in order to find the proposed development consistent with the water quality protection policies of Chapter 3. In combination, these conditions will assure that site runoff is appropriately treated and discharged to protect the quality of downstream waters, which include Carmel Creek, the CVREP mitigation area and Los Penasquitos Lagoon. In addition, the applicant is proposing to retrofit existing SR 56 (west end) with two CDS units which will improve water quality. Only as conditioned can the Commission find the proposed highway construction, and subsequent highway operation, consistent with the cited policies of the Coastal Act.

4. Visual Resources. The following policy of the Coastal Act addresses visual resources, and states, in part:

Section 30251

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas....

The project site is well removed from the shoreline and is not located within any designated public park or recreation area. However, the portions of the proposed middle segment of SR 56 within the coastal zone will be located primarily in currently

undeveloped lands consisting of rolling hills and canyons, streams (some seasonal) and both native and non-native vegetation. The westernmost part of the proposed highway, addressed in a previous City-issued permit, will be located adjacent to existing residential development, but the highway segment addressed herein is located mostly in currently open countryside. However, the approved future land uses north of much of the proposed highway (out of the coastal zone) will consist of a mix of residential, commercial and institutional (school) uses. The area will build out over time, which will gradually change the visual character of the area from open land to urban development. South of the proposed highway, most of the land will remain in open space.

The proposed highway segment itself will not be especially prominent, since it will be built primarily on the ground surface, with the exception of grade separations necessary at the interchanges and bridges over canyons. The applicant proposes to landscape the right-of-way on both sides of the proposed highway. The configuration of the coastal zone boundary in this area trends mainly east-west, since it is intended to include as much of the Los Penasquitos Lagoon watershed through Carmel Valley as the five-mile inland limitation will allow. Because of this, most of the right-of-way north of the proposed highway, and even some portions of the highway itself, are not in the coastal zone. Thus, the Commission has no ability to dictate the types of landscaping or irrigation applied to those areas. Because this area will be built out with urban uses in the future, Caltrans has expressed an intent to use ornamental landscaping north of the road. The Commission has several concerns with this approach as inappropriate species composition, irrigation systems, fertilizers and pesticides could affect downstream resources in the coastal zone. Therefore, the Commission suggests the use of drought-tolerant, non-invasive species, which will reduce the need for irrigation, fertilizer and pesticides. Excess water can result in nuisance flows and exacerbate runoff, while residue from fertilizers and pesticides will enter runoff and eventually flow into the coastal zone, threatening downstream resources.

In contrast, the right-of-way area south of the proposed highway is within the coastal zone. Thus, the Commission has the ability to address landscaping improvements in this location, and has done so in Special Condition #6. This condition was addressed briefly in the previous finding on water quality, in relation to the choice of vegetation to be used in the center median. Since the areas south of the road in the coastal zone, except where residential development already exists, will remain in an undeveloped condition, Caltrans has expressed an intent to use native vegetation consistent with the surrounding vegetative communities. However, no landscaping plan has been prepared to date reflecting this intent. Special Condition #6 requires submittal of a final landscaping plan for all the areas of right-of-way, including the area north of the proposed highway covered by the subject permit.

The plan required in the condition must do the following: 1) it must utilize drought tolerant, non-invasive native plant materials acceptable to the CDFG, the Service and the Corps; 2) it must allow only temporary irrigation for plant establishment; 3) it must include a written commitment to maintain all planted materials in good growing condition; 4) and it must avoid or minimize the use of fertilizers and pesticides.

Exceptions to both the selection of species and use of permanent irrigation is allowed at the western end of the alignment, where residential development exists in close proximity to the proposed alignment, both north and south of the road. Although no source of reclaimed water exists in the area at this time, the special condition, and Caltrans own policies, require its use whenever it becomes available. Finally, the condition also provides that permanent landscaping must be installed concurrent with, or within sixty days following, completion of highway construction. As conditioned, the Commission finds the proposed middle segment of SR 56 consistent with the visual resource policies of the Coastal Act. The special condition also enhances the project's consistency with biological resource and water quality policies of the Act by controlling the types of vegetation installed adjacent to sensitive resources and minimizing use of fertilizers and pesticides that could enter nearby water bodies.

5. Public Access/Traffic Circulation. Many policies of the Coastal Act address the provision, protection and enhancement of public access opportunities, particularly access to and along the shoreline. In the subject inland area, the following policy is most applicable:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

The proposed middle segment of SR 56 will complete a partially built, east-west trending highway connecting two north-south trending highways, namely an inland freeway (I-15) and a coastal freeway (I-5). It will provide the only connection between these two freeways between SRs 52 and 78, which are located approximately seven miles to the south and eighteen miles to the north of the proposed SR 56 at its western end (I-5). Currently, the western segment of SR 56, extending from I-5 approximately two miles inland through Carmel Valley, is completed (pursuant to coastal development permit #6-90-123), as is a small eastern portion extending west from I-15 (outside the coastal zone) for about two miles. Moreover, the City has already begun construction of the easternmost part of the proposed middle segment, which is also well out of the coastal zone.

In recent years, the communities located along the I-15 corridor, in the northeastern portion of the City of San Diego, have seen intense growth. For the most part, these are bedroom communities, with neighborhood commercial facilities intended only to serve the immediate area. However, SR 56 has been identified as a critical part of the regional traffic system for decades, and is not a recent response to growth. Historic regional employment and shopping centers are located in many other areas, including downtown San Diego, Mission Valley, Sorrento Valley, Kearney Mesa and the Golden Triangle/Torrey Pines Mesa area. In addition, the major regional public recreational

facilities (all county beaches and Mission Bay Park) are located a significant distance to the west. Thus, residents in the northeastern part of San Diego generally commute daily, both for work and recreation. The primary purpose of the highway connection is to alleviate traffic on other portions of the regional circulation system and neighborhood streets, particularly during peak commuter hours. Although not specifically designed to enhance public access to the coast, the completion of SR 56 will certainly reduce required travel times from these rapidly-developing inland communities to the shorelines of Del Mar and Torrey Pines. Therefore, the Commission finds the proposed highway segment consistent with Section 30210 of the Act.

6. Conflict between Coastal Act Policies. Section 30007.5 of the Coastal Act provides the Commission with the ability to resolve conflicts between Coastal Act policies. This section provides that:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

A. Conflict. In order for the Commission to utilize the conflict resolution provision of Section 30007.5, the Commission must first establish that a substantial conflict between two statutory directives contained in Chapter 3 of the Coastal Act exists. The fact that a project is consistent with one policy of Chapter 3 and inconsistent with another policy does not necessarily result in a conflict. Rather, the Commission must find that to deny the project based on the inconsistency with one policy will result in coastal zone effects that are inconsistent with another policy.

In this case, as described above, the proposed project is inconsistent with the wetland protection policies of the Coastal Act because the proposed fill of 0.427 acres of riparian wetlands is not an allowable wetland fill activity as identified by Section 30233(a)(1)-(8). However, to deny the project based on this inconsistency with Section 30233(a)(1)-(8) would result in significant adverse impacts inconsistent with the water quality provisions of Section 30231. A major component of the proposed project is to improve water quality on the existing portion of SR 56 by retrofitting the facility with two CDS units, which have been described previously. These are designed to filter out both sediments and pollutants from the road runoff and will pretreat the discharge before it enters the CVREP mitigation site. The units are proposed just east of the SR 56 interchanges at El Camino Real and Carmel Creek Road. Exhibits #5 and #6 show the proposed locations and the units' design.

Proposed SR 56, existing SR 56 and CVREP are all located upstream of Los Penasquitos Lagoon, which empties into the Pacific Ocean between Torrey Pines State Beach and the beaches of Del Mar. In addition to providing a variety of wetland habitats (riparian as

well as freshwater, brackish and salt marshes) utilized by avian and mammal species, the lagoon also serves as nursery area for juvenile fish. Moreover, it provides some public recreation opportunities as people play and swim at the lagoon's mouth; in particular, families with small children tend to gather here, since the waters are shallow, warm and absent large waves. Storm events often result in posting of the area with signs warning people to avoid water contact, due to dangerous levels of contaminants. Los Penasquitos Lagoon is also identified as an impaired water body due to sediments. Installation of the two proposed CDS units will result in a reduction of both sediments and urban pollutants eventually reaching the lagoon and lagoon mouth, thus enhancing the area for both wildlife and human use.

If the Commission were to deny the project based on the project's inconsistencies with the wetland fill provisions of Section 30233(a)(1)-(8), the water quality impacts from pollutants and sediments would not be reduced. The proposed CDS units will only be installed in conjunction with construction of the proposed highway segment; the City is not otherwise legally required to install them. As discussed previously, there is no feasible alternative alignment of the middle portion of SR 56 that would avoid the 0.427 acres of impacts to coastal zone wetlands other than the "no project" alternative. This alternative is not feasible because the current populations living in the northern part of San Diego, and significant additional growth expected in this area, make this segment a highway linkage without which there will be significant loss of mobility, increased congestion and travel time, greater air emissions and increased noise pollution on local streets. Except for a few small, infill-type projects, these areas of intense residential and commercial growth are all located outside the coastal zone, and thus not subject to any oversight by the Coastal Commission. In addition, all possible alternative alignments would result in greater environmental impacts overall than the proposed, environmentally-preferred alternative.

With respect to the project's wetland impacts in the coastal zone, these would be identical and unavoidable for all possible alignments, since they occur at the western end of the project where the alignment is fixed by existing surrounding development. Thus, selecting any alternative alignment would not avoid the conflict with Section 30233(a)(1)-(8) and deny the project altogether would result in a conflict with Section 30231, since the CDS units retrofitting existing SR 56 would not be installed.

The proposed project includes wetland fill that is inconsistent with the wetland policies of the Coastal Act. However, this project will provide water quality benefits that will improve the biological productivity and the quality of coastal waters. Without the project, sediments and pollutants from the existing SR 56 will continue to enter Carmel Creek, CVREP and Los Penasquitos Lagoon at current levels, resulting in degradation of water quality resources and public access in a manner inconsistent with the Coastal Act. Therefore, the Commission finds that the proposed project creates a conflict among Coastal Act policies.

B. Conflict Resolution. After establishing a conflict among Coastal Act policies, Section 30007.5 requires the Commission to resolve the conflict in a manner that is on balance

most protective of coastal resources. In this case, the proposed project would result in the fill of 0.427 acres of isolated southern willow scrub riparian wetlands. A road accessing residential, commercial and agricultural uses separates the subject riparian habitat area from Carmel Creek, whose main riparian corridor occurs further west. In the specific location where this small, seasonal tributary stream crosses under the road and connects with Carmel Creek, there is little or no vegetation of any kind, due to the presence of residential development, drainage improvements which partially channelized Carmel Creek and a small golf course. Thus, although the roughly half-acre of southern willow scrub is correctly identified as a wetland, there is some doubt that it provides much viable wildlife habitat, since it does not connect to any larger habitat area. It also appears to have a very limited water source, consisting mainly of runoff from surrounding roads.

There are important factors in the Commission's use of the conflict resolution provisions of Section 30007.5 that, in this particular case, create a unique situation. SR 56 as a whole has been identified as a critical transportation facility in regional planning documents since before the Coastal Act was passed and the Coastal Commission created. It is also identified in several documents certified by the Coastal Commission, including the North City Local Coastal Program Land Use Plan Addendum, the Carmel Valley Neighborhood 8 Community Plan, the North City Future Urbanizing Area Framework Plan and the Pacific Highlands Ranch Subarea Plan. The proposed middle segment of SR 56 will connect two existing segments of a major regional transportation linkage, the western segment having been constructed under Coastal Development Permit #6-90-123 and the eastern segment being located outside the coastal zone. Most of the proposed highway segment is located outside the coastal zone. This includes not only the more than three miles of the alignment east of the coastal zone's inland extent, but also portions of the proposed highway where the coastal zone boundary bisects the road in a linear fashion, as depicted on Exhibits #2 and #3. Moreover, most of the development this linkage will serve is located in inland areas, rather than in the coastal zone, such that the Commission has no ability to address growth limitations or alternative development patterns that could have reduced or eliminated the need for SR 56. If this project did not represent completion of a partially-constructed highway that has been identified in formal planning documents for decades, and that has also been endorsed by the Commission in several prior LCP and permit actions, the Commission could not permit the wetland fill through the use of Section 30007.5, and would accept that ongoing water quality concerns would remain.

However, the proposed project will improve water quality through the applicant's proposal to retrofit the existing western segment of SR 56 through the installation of two CDS units. The applicant has chosen to place these in the two locations they feel will provide the most benefit, although additional discharge points along existing SR 56 will not be similarly improved. The applicant maintains the two proposed BMPs are a reasonable improvement commensurate with the project's level of biological impact. The Commission concurs in this instance, and finds that the benefits of these water quality improvements would be substantial. They are designed to handle 100% of the runoff in the tributary area and will capture 95% of gross pollutants, in addition to removing small coarse sediment and pretreating the discharge before it enters the CVREP

mitigation area. The reduction in contaminants will enhance the use of downstream resources by wildlife and humans. In addition, the applicant will provide a new monitoring program, including monitoring the discharge points from the two CDS units, monitoring water quality at two locations within the CVREP mitigation area, and monitoring the discharge point where CVREP empties into Los Penasquitos Lagoon.

In addition, the proposed project includes the creation of riparian wetlands as mitigation for the project's impacts. The mitigation site is located in McGonigle Canyon, in an area identified in the City's Multiple Species Conservation Plan MHPA system. It will be part of a much larger open space complex which connects with Los Penasquitos and San Dieguito Lagoons, as well as large habitat areas to the east. Thus, the mitigation site is likely to provide more viable habitat than currently exists in the isolated wetland area to be impacted. The Commission therefore finds that the proposed project would have significant resource benefits.

In addition, the major regional public recreational facilities (all county beaches and Mission Bay Park) are located a significant distance to the west of the rapidly expanding population in the northeastern portion of San Diego. Thus, residents in these communities generally commute daily, both for work and recreation. The completion of this east-west highway connector, identified in many regional planning documents for decades, will enhance public access to the coast by reducing required travel times from these developing inland communities to the shorelines of Del Mar and Torrey Pines. Without construction of the middle segment of SR 56, the mandate of Section 30210 of the Coastal Act to maximize public access to the coast will not be fully realized.

In resolving the identified Coastal Act conflict, the Commission finds that the impacts on coastal resources from not constructing the project will be more significant than the project's wetland habitat impacts. Therefore, the Commission finds that approving the project is, on balance, most protective of coastal resources.

This finding that approving the project is most protective of coastal resources is based, in part, on the assumption that the water pollution control facilities to be constructed will be continually managed and maintained in the designed manner in the future. It is also based on an assumption that the wetland mitigation site will be constructed as proposed and maintained in perpetuity. Should either the constructed water pollution control facilities not be managed and maintained as designed, or the mitigation site not be implemented as proposed, the benefits of the water quality improvement project would not be realized to an extent that would outweigh the loss of nearly half an acre of wetland habitat. Therefore, the Commission attaches several special conditions to ensure that the desired result is achieved; these have been discussed in detail in the previous findings addressing biological resources and water quality. The Commission finds that without the special conditions, the proposed project could not be approved pursuant to Section 30007.5 of the Coastal Act.

7. Local Coastal Planning. Section 30604(a) also requires that a coastal development permit shall be issued only if the Commission finds that the permitted

development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. In this case, such a finding can be made only as discussed above and with the inclusion of the attached special conditions.

The portion of SR 56 addressed in this permit is located in the North City Future Urbanizing Area (FUA), which is an area of deferred certification in the City of San Diego's LCP. The Commission certified a Framework Plan for the FUA several years ago; this plan identified that the area was divided into five subareas, and future planning would occur through the development, and certification, of subarea plans. Only at this stage would the City request that permit jurisdiction be transferred from the Commission to the City. The proposed road segment, which is identified in many previous planning documents including the Framework Plan, is also identified as an integral component of the circulation element in the Pacific Highlands Ranch Subarea Plan (Subarea III of the FUA), certified with suggested modifications by the Commission approximately one year ago. Final, effective certification has not occurred to date and permit jurisdiction has not transferred. Moreover, the subject application was deemed filed in September, 1999, such that the Commission would continue to process the permit in any event, unless the City wished to withdraw the subject application and process its own coastal development permit for the proposed development.

Although Chapter 3 of the Coastal Act is the standard of review for this project, the proposal is consistent with the Commission's past actions on both the Framework Plan and the more recent subarea plan. In addition, as discussed above and with the inclusion of special conditions, the project has been found consistent with all cited policies of the Coastal Act. Therefore, approval of the development, as conditioned, will not prejudice the City's ability to complete the LCP process for this area.

8. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of coastal development permit applications to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

As discussed herein, the proposed project, as conditioned, will not cause significant adverse impacts to the environment. Specifically, as conditioned, the project has been found consistent with the biological resources, water quality, visual resources and public access policies of the Coastal Act. There are no feasible alternatives or mitigation measures available which would substantially lessen any significant adverse impact which the activity might have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Compliance. All development must occur in strict compliance with the proposal as set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

ATTACHMENT 3

CALIFORNIA COASTAL COMMISSION, FINDINGS FOR
DOUBLE TRACKING PROJECT, CC-004-05 (NORTH COUNTY
TRANSIT DISTRICT), ADOPTED NOVEMBER 16, 2005

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200



W 20a

STAFF REPORT AND RECOMMENDATION**ON CONSISTENCY CERTIFICATION**

Consistency Certification No.:	CC-004-05
Staff:	MPD-SF
File Date:	1/5/2005
3 Months:	4/5/2005
6 Months:	7/5/2005
Extended to:	12/1/2005
Commission Meeting	11/16/2005

APPLICANT: North County Transit District

DEVELOPMENT
LOCATION:

Within railroad right-of-way adjacent to I-5, southern coastal portion of Camp Pendleton Marine Corps Base, northern San Diego County (Exhibit 1)

DEVELOPMENT
DESCRIPTION:

Construction of 1.8 mi. of new mainline track and rehabilitation of 0.9 mi. of existing track, adjacent and parallel to existing track (Exhibits 2-3)

SUBSTANTIVE
FILE DOCUMENTS: See page 34.

EXECUTIVE SUMMARY

The North County Transit District (NCTD) proposes to construct the "O'Neil to Flores Second Track project" consisting of adding a second railroad track within the existing NCTD right-of-way along a 2.7 mi. stretch of railroad corridor, just east of Interstate 5 (I-5) on Camp Pendleton Marine Corps Base in northern San Diego County. The purpose of the "double-tracking" project is to reduce delays caused by trains traveling in opposite directions having to stop and wait until the line is clear. The project is intended to increase operational efficiency and service reliability, and, hopefully, to induce more people to use passenger rail as an alternative travel mode to the personal automobile. The Commission has previously concurred

with similar NCTD double tracking projects further north on Camp Pendleton, in the San Onofre area (CC-86-03), and further south on Camp Pendleton, across and south of the Santa Margarita River (CC-52-05).

The project will not adversely affect any existing public access and in fact will help maintain highway capacity on I-5 for access to and along the shoreline. One of the applicable Coastal Act access policies (Section 30252) encourages maintenance and enhancement of public access through facilitating the provision or extension of transit service. The project is therefore consistent with the public access policies of the Coastal Act (Sections 30210 and 30252). The project is also consistent with the air quality policy (Section 30253) promoting energy consumption-reduction strategies (e.g., reducing automobile vehicle miles traveled). The project includes appropriate Best Management Practices (BMPs) to minimize water quality impacts from construction and operation of the project, and the project will reduce automobile vehicle miles traveled, and, consequently, pollutants from highway runoff, thereby benefiting water quality. The project is therefore consistent with the water quality policy (Section 30231) of the Coastal Act.

Potential habitat issues raised are permanent effects on 2.96 acres (and temporary impacts on 2.77 acres) of natural habitat communities, including: upland vegetation (Diegan coastal sage scrub, valley needlegrass grassland, and non-native grassland)), and wetlands (southern willow scrub and mulefat scrub). NCTD surveys showed several environmentally sensitive species occurring in the area, including the California gnatcatcher, the least Bell's vireo, and vernal pools containing several sensitive species, including Riverside and San Diego fairy shrimp. The project has been designed to avoid impacts to these sensitive species to the degree possible, as construction activities have been scheduled to avoid impacts to California gnatcatchers and least Bell's vireos, and vernal pool impacts will be avoided through the construction of soil nail walls to contain the trackbed embankment. Mitigation commitments would include 2:1 mitigation for impacts to diegan coastal sage scrub; 3:1 mitigation for valley needlegrass grassland; 0.5:1 mitigation for non-native grassland; and 3:1 mitigation for wetland impacts (southern willow scrub and mulefat scrub). Minor increases in mitigation to assure no net loss of coastal sage scrub and wetland habitat are necessary to enable the project to comply with the mitigation requirements of the Coastal Act. Therefore, the Commission is conditionally concurring to require that the mitigation package, which includes a mix of acquisition, preservation, and new habitat creation, will need to increase the coastal sage scrub mitigation ratio from 2:1 to 3:1, and provide at a minimum 1:1 creation of new habitat for coastal sage scrub and wetland habitat. This requirement would mean NCTD must provide an additional $\frac{1}{4}$ acre of coastal sage scrub habitat creation and $\frac{2}{3}$ acre of wetland creation, and the total package (i.e., acquisition plus preservation plus and new habitat) for coastal sage scrub would need to increase by 1.44 acres. (If NCTD does not agree to the condition, then the Commission's decision is treated as an objection and NCTD would have the right to appeal the decision to the Secretary of Commerce.)

In looking at the Coastal Act's wetland and habitat requirements, the project is the least environmentally damaging feasible alternative, and includes avoidance, minimization, monitoring and, as conditioned, mitigation where appropriate. The Commission found the two previous NCTD double tracking proposals involving wetland fill on Camp Pendleton to not increase capacity and to qualify under the wetland policy as incidental public services under Section 30233(a)(5) (CC-86-03 and CC-52-05). However, neither of these previous cases involved analysis under Section 30240, which contains a different and more stringent "allowable use" test. Because the subject project would be located within occupied coastal sage scrub/gnatcatcher habitat, which distinguishes it from the previously reviewed double-track proposals, despite the breeding seasons avoidance and off-site mitigation measures, it must be considered to be sited within an environmentally sensitive habitat area (ESHA). As such, it is inconsistent with the "allowable use" test of Section 30240(a) of the Coastal Act, which requires that "...*only uses dependent on those resources* shall be allowed within ... [environmentally sensitive habitat] areas." In addition, information NCTD has provided to support the project's access benefits analysis, combined with the programmatic operational discussion contained in the Fish and Wildlife Service's Biologic Opinion, lead to the conclusion that if not individually, then cumulatively the project is likely to increase capacity. If it increases capacity, it cannot qualify as an allowable use under Section 30233(a) as an incidental public service, and none of the other eight allowable uses in Section 30233 apply. Therefore, the only way the Commission could find the project consistent with the Coastal Act would be through the "conflict resolution" provision (Section 30007.5).

The project creates a conflict between the access/energy conservation/air and water quality policies of the CCMP on the one hand (Sections 30210, 30252, 30231, and 30253(4)) and the allowable use tests of the environmentally sensitive habitat/wetland policies (Sections 30240 and 30233(a)) on the other. Although impacts have been avoided and minimized where feasible, and residual impacts would be mitigated, even as conditioned the project is not an allowable use under Sections 30240 and 30233 of the Coastal Act. If the Commission were to object to the proposed project based on environmentally sensitive habitat/wetland policy requirements, the result would frustrate public access and lead to conditions that are inconsistent with the access policies (Section 30210). Such an objection would also result in adverse effects to coastal waters and the air basin and be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. In resolving the Coastal Act conflict raised, the Commission finds that the impacts on coastal resources from not constructing the project would be more significant and adverse than the project's ESHA and wetland habitat impacts, which will be mitigated. The Commission therefore concludes that, under Section 30007.5, and as conditioned, concurrence with this consistency certification is consistent with the Coastal Act because it is, on balance, most protective of coastal resources.

I. STAFF SUMMARY AND RECOMMENDATION:

A. Project Description. The NCTD proposes to upgrade its existing railroad track system by constructing a new second main track adjacent to its existing track in northern San Diego County (Exhibits 1-3). The project is located along the Los Angeles to San Diego (LOSSAN) Rail Corridor, within the boundaries of the U.S. Marine Corps Base Camp Pendleton (MCBCP), and east of I-5. NCTD leases the railroad right-of-way from the Marine Corps. The proposed project involves the construction of 1.8 mi (2.9 km) of new mainline track connecting the existing Stuart siding with the existing Pulgas siding, and rehabilitating the existing 0.9 mi. (1.45 km) Pulgas siding to mainline track standards. The track for the new second mainline would be located within the existing NCTD right-of-way, adjacent to and 15 ft. east of the existing mainline track. Manufactured slopes would extend outside the existing right-of-way in several places. In total, 10,640 ft. of new mainline track would be installed, 6,006 ft. of existing track would be shifted, and 1,653 ft. would be removed.

The new second mainline would be constructed on ballast, (underlain by subballast with a 2-ft. walkway). Cut areas would have a maximum slope of 1:1. Fill areas would have an outer 1.5:1 or 2:1 slope, depending on the height of the embankment. To minimize the project footprint, proposed embankments higher than 5 ft. would involve a geogrid reinforcing system, enabling a steeper slope. In order to avoid vernal pool complexes, two sections of soil nail retaining wall are proposed (at stations 240+55-250+46 and 258+50 to 259+68, 17 ft. and 11-ft. high respectively). Grading would involve 39,702 cu. yds. of excavation, 24,214 cu. yds. of which would be reused on the project as new embankment, with the remainder transported offsite. The project would also include: (a) extension of four existing box culverts (at mileposts MP 219.0, MP 219.2, MP 219.9, and MP 220.2 (Exhibit 2)); (b) removal of two track signal instrument houses and associated control point signal appurtenances; (c) construction of one intermediate signal and instrument house; (d) realignment of 31.39 meters (103 feet) of the drainage channel at the MP 220.2 culvert to restore positive drainage of French Creek; and (e) relocation of an existing Southern California Gas Company gas main and an existing MCI-Worldcom fiber optic telecommunications line. Construction access and staging would be from Stuart Mesa Road on Camp Pendleton, as well as within the existing ROW. Access to the tracks from the staging sites would be via existing dirt roads that are currently used by both military vehicles and railroad maintenance activities.

B. Background/Need. The rail line has served coastal Southern California for 113 years. In the late 1800s, the Atchison, Topeka and Santa Fe railway (AT&SF) built the "Surf Line" railroad line between Los Angeles and San Diego. The North San Diego County Transit Development Board (NSDCTDB) purchased the Surf Line in 1995. Currently, Amtrak operates 24 passenger trains per day along the project corridor as part of the Pacific Surfliner service between Los Angeles and San Diego. In addition to the Amtrak service, the Southern California Regional Rail Authority (Metrolink) operates 10 passenger trains each weekday through the project limits as a part of its commuter service between Los Angeles and

Oceanside. The Burlington Northern and Santa Fe Railway (BNSF) also typically operates four to eight daily freight trains through the project limits. Overall, approximately 36 to 42 revenue train movements occur per day (on weekdays).

The need for this project stems from the high levels of automobile congestion on Southern California's highway system. Caltrans' 2002-published California State Rail Plan, 2001-02 to 2010-11, articulates its vision for intercity passenger rail as achieving three objectives: (1) to "provide relief to highway and airway congestion" through reliable and efficient intercity rail service; (2) to promote intercity rail to "provide a rail transportation alternative to other travel modes"; and (3) to "improve air quality, conserve fuel, and contribute to efficient and environmentally superior land use."

The project corridor currently includes a single mainline track and the Stuart and Las Pulgas sidings within the North County Transit District (NCTD)/San Diego Northern Railway (SDNR) right-of-way on Camp Pendleton. The track is used for train travel in the Los Angeles to San Diego (LOSSAN) corridor, which operates near full capacity. Since throughout most of the corridor only one mainline track is available for both northbound and southbound trains, the trains must adhere to a fixed schedule in order to operate efficiently. However, when one train goes off schedule, the remaining trains must stop and wait on an existing siding for the first train to get back on schedule. This causes a cascading delay effect, negatively affecting on-time performance and service reliability. Increasing the amount of double track by connecting the existing sidings would allow trains to pass each other while underway, thus reducing overall train delays and providing improved, more reliable service. The proposed project would increase the capacity of the corridor enough to reduce the number and duration of train delays, thus improving service reliability and inducing people to turn to passenger rail as an alternative travel mode to the personal automobile.

When completed, the length of double track available for train meets and passes would extend for a total length of 4.7 miles (MP 218.1 to MP 222.8). The Commission has also: (1) concurred with two NCTD consistency certifications for double tracking on Camp Pendleton, a 2.6 mi. long double tracking project further north on Camp Pendleton, in the San Onofre area (CC-86-03), and double tracking further south on Camp Pendleton, across and south of the Santa Margarita River (CC-52-05) (Exhibit 1); and (2) approved several coastal development permits County-wide for double tracking (see following paragraph). NCTD does not anticipate submitting any further double tracking proposals on Camp Pendleton; future double tracking would likely be submitted as part of the LOSSAN high-speed rail project currently being studied by the California High-Speed Rail Authority, which the State established in 1996 to plan and implement a statewide high-speed train system for California, including a Los Angeles to San Diego segment.

C. Procedures – Permitting Issue. The project triggered federal consistency review because it needed U.S. Army Corps of Engineers and U.S. Marine Corps permission. However the Commission also believes it is subject to the permitting requirements of the

Coastal Act, as a private (i.e., non-federal) activity on federal land, based on the U.S. Supreme Court's "Granite Rock decision" (CCC v. Granite Rock Co.)(1986)(480 U.S. 572). The NCTD disagrees with this position; however the Commission is willing to conditionally concur with this consistency certification because it can be found consistent with Chapter 3 of the Coastal Act. Any permit review would involve the same substantive standard of review (i.e., Chapter 3). The Commission notes that the NCTD has applied for a number of permits for its "double tracking" activities in other sections of the coast, including, CDP's No. 6-01-64 (NCTD - Balboa Avenue), 6-01-108 (NCTD - Tecolote Creek), 6-93-60 (NCTD - Del Mar), 6-94-207 (NCTD - Solana Beach), 6-93-106 (NCTD - Carlsbad), and 6-93-105 (NCTD - Camp Pendleton).

D. Applicant's Consistency Certification. The North County Transit District certifies the proposed activity complies with the federally approved California Coastal Management Program and will be conducted in a manner consistent with such program.

E. Applicable Legal Authorities. Section 15 CFR § 930.4 of the Federal Consistency regulations provides, in part, that:

(a) Federal agencies, applicants, persons and applicant agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a . . . Federal agency's approval under Subparts D, E, F or I of this part, would allow the State agency to concur with the Federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable Subpart and notify, pursuant to §930.63(e), applicants, persons and applicant agencies of the opportunity to appeal the State agency's objection to the Secretary of Commerce within 30 days after receipt of the State agency's conditional concurrence/objection or 30 days after receiving notice from the Federal agency that the application will not be approved as amended by the State agency's conditions; and

(2) The Federal agency (for Subpart C), applicant (for Subparts D and I), person (for Subpart E) or applicant agency (for Subpart F) shall modify the applicable plan, project proposal, or application to the Federal agency pursuant to the State agency's conditions. The Federal agency, applicant, person or applicant agency shall

immediately notify the State agency if the State agency's conditions are not acceptable; and

(3) The Federal agency (for Subparts D, E, F and I) shall approve the amended application (with the State agency's conditions). The Federal agency shall immediately notify the State agency and applicant or applicant agency if the Federal agency will not approve the application as amended by the State agency's conditions.

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable Subpart.

F. Staff Recommendation and Motion. The staff recommends that the Commission adopt the following motion:

MOTION: I move that the Commission **conditionally concur** with the North County Transit District's consistency certification CC-004-05 that, if modified in accordance with the following condition, the project described therein would be consistent with the enforceable policies of the California Coastal Management Program (CCMP).

Staff Recommendation:

The staff recommends a **YES** vote on the motion. Passage of this motion will result in a conditional concurrence with the certification and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

Resolution to Conditionally Concur with Consistency Certification:

The Commission hereby **conditionally concurs** with the consistency certification by the North County Transit District, on the grounds that, if modified in accordance with the following condition, the project described therein would be consistent with the enforceable policies of the CCMP.

Condition:

1. Increased Mitigation. NCTD shall add to the offsite mitigation program provisions for the creation of at least 1:1 creation of new coastal sage scrub and wetland habitat (i.e., by adding 0.25 acres of coastal sage scrub habitat creation and 0.65 acres of wetland habitat creation), and the mitigation ratio for coastal sage scrub mitigation shall be increased from 2:1 to 3:1 (i.e., that the total "package" - acquisition plus preservation plus new habitat for coastal sage scrub would need to include an additional 1.44 acres).

G. Right of Appeal (in the event the conditional concurrence is treated as an objection):

If NCTD does not agree to the condition, pursuant to 15 CFR Part 930, Subpart H, and within 30 days from receipt of notice of the Commission's action, NCTD may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the California Coastal Commission and the U.S. Army Corps of Engineers, U.S. Marine Corps, and Federal Transit Administration. The Secretary may collect fees from the NCTD for administering and processing its request.

II. Findings and Declarations.

The Commission finds and declares as follows:

A. Public Access and Recreation. Section 30210 of the Coastal Act provides:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access ... shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse

Section 30212 provides that access should not be provided where it would be inconsistent with public safety, military security needs, or the protection of fragile coastal resources. Section 30252 encourages public transit and identifies reducing traffic congestion as a coastal access benefit, providing, in part, that:

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service....

Concerning access issues, NCTD maintains that the project will not interfere with existing public access to coastal areas and recreational opportunities. NCTD points out that the existing railroad right-of-way is not open to general access (beyond train travel itself) and is strictly controlled, due to military security and public safety needs. NCTD asserts that the project conforms with the public access objectives of the Coastal Act both because it would not alter access to any existing public coastal accessways, and because it would benefit public coastal access and reduce traffic congestion by providing improved public transportation rail services (i.e., Coaster, Metrolink, Pacific Surfliner) as an alternative to individual vehicles. NCTD also points out that: (1) any freight train service improvements would also contribute to relieving congestion on I-5; (2) construction and staging activities would be located outside publicly accessible areas and thus avoid affects to existing access; and (3) the project will contribute to

reduced energy consumption and vehicle miles traveled by providing a more efficient alternative to personal automobile travel, consistent both with Section 30252 as well as another Coastal Act goal expressed in Section 30253 (related to air quality).

In reviewing NCTD's proposal for Oceanside-Escondido Rail Project (CC-029-02), which was proposed from inland areas to the shoreline and was a conversion of a freight rail corridor to a public transit passenger rail system connecting Oceanside, Vista, San Marcos, Escondido, and unincorporated areas of San Diego County, the Commission noted that: (a) traffic congestion adversely affect public access to the shoreline; (b) Section 30252 of the Coastal Act identifies the connection between public transit and public access to the shoreline; (c) although that project was partly parallel and partly perpendicular to the shoreline, because its service area included coastal destinations (including public beaches and a recreational boating harbor in Oceanside), it would provide an alternative means to get to the ocean; (d) it would reduce auto-related air emissions, thereby contributing to the improvement of regional air quality; (e) as part of a regional public transportation system, including bus service, light-rail and commuter trains, and trolleys, the project would increase acceptance of public transit as a desirable mode of transportation; and (f) as its acceptance and use increases, public agencies may be motivated to further improve the public transit system and these improvements will result in corresponding reductions in traffic congestion. The Commission concluded:

In conclusion, the proposed project will improve public access to the shoreline by reducing traffic on roads that also provide for shoreline access and by encouraging mass transit as an alternative means to get to the shoreline. Therefore, the Commission finds that the proposed project is consistent with Sections 30210 and 30252 of the Coastal Act, and thus it is consistent with the access policies of the CCMP.

Thus, in reviewing several past actions involving public transit improvements in San Diego County, including the previous NCTD double tracking projects to the north and south (CC-86-03 and CC-52-05, respectively), the Commission has recognized that: (1) traffic congestion constitutes a constraint on public recreation and access to the shoreline; (2) increased traffic on highways such as I-5, which is a major coastal access thoroughfare, reduces the ability of the public to attain access to coastal recreation areas and makes it more difficult for the public to get to the beach; and (3) improvements to public transit benefit public access, as discussed in Section 30252. However, due to the habitat impacts discussed in the following section of this report, the Commission staff requested a greater level of specificity describing the access benefits than for the previous two double tracking projects on Camp Pendleton. NCTD's response is that:

By implementing this project, two short passing tracks of approximately one mile, and approximately 2.2 miles in length, will be connected to form the single passing track of 4.7 miles. This will reduce from four to two the potential locations in this stretch of track where trains may currently have to idle, waiting for trains in the opposite direction to pass. This in itself is an environmental benefit. The new longer passing siding will also make possible "running meets", which shorten travel times, and make service more reliable, thus making passenger rail more attractive as a mode of transportation and reducing the environmental impacts of automobile travel through new rail patronage.

Double-track construction between the Orange County border and San Diego is part of a larger strategic planning effort for the second most heavily traveled intercity passenger rail corridor in the country and the only existing rail link between the cities of Los Angeles and San Diego (LOSSAN). The purpose of double-track construction in the LOSSAN corridor is to help meet the projected increase in travel demand for the year 2025 between the cities of Los Angeles and San Diego, to substantially reduce the travel time and increase reliability, and to increase the safety and accessibility of passenger rail service throughout the LOSSAN corridor (LOSSAN 2003). Forty-one percent of the 125-mile rail corridor consists of single-track. Train movement is constrained on these single-track sections because only a single train at a time can be present along a given single-track section, resulting in delays and a reduction in the attractiveness of rail as a travel choice (LOSSAN 2003).

Description of Services in Corridor and Benefits of Project

A major reason for proposing the O'Neil-Flores project is to improve the reliability of all current passenger rail services and to accommodate the projected growth in travel demand over the next 20 years. To the extent this travel demand increase can be accommodated on passenger rail services rather than the private automobile, air quality, energy savings, and traffic congestion relief benefits will accrue to the region. In addition, as described below, these services are all experiencing ridership increases now.

It should also be noted that the passenger rail services in the corridor provide significant coastal access for residents of inland areas. These services provide a direct connection to coastal areas just blocks from the beach, such as Oceanside Transit Center (OTC), San Clemente Train Station, Carlsbad, Encinitas, and Solana Beach Station.

Currently, Amtrak operates 11 to 12 trains in each direction per day through the action area as part of the Pacific Surfliner intercity passenger rail service between Los Angeles and San Diego. In addition, Metrolink operates 6 trains in each direction each weekday through the project limits from Orange County to the OTC as part of its

commuter rail service between Oceanside and Los Angeles. NCTD operates 11 trains in each direction each weekday as part of its Coaster Commuter Rail service between Oceanside and San Diego. The BNSF typically operates two to four freight trains in each direction through the action area. Thus, there are currently 19 to 22 revenue train movements north of OTC and 24 to 27 revenue trains movements south of OTC in each direction per day on weekdays. Amtrak operates 11 trains in each direction on Saturdays and Sundays. NCTD operates four trains in each direction of Saturdays. BNSF operates six to ten trains on weekends.

For the year 2020, future train volumes through the area are anticipated to increase to 16 Amtrak trains in each direction per day, nine Metrolink trains in each direction per day, 27 Coaster trains in each direction per day, and five to six BNSF freight trains in each direction per day (Table 1). Increased train volumes will result in 30 to 31 revenue trains in each direction per day north of OTC and 48 to 49 revenue trains in each direction per day south of OTC. The increase in train volume through the action area will almost double by 2020.

Table 1. Number of trains operated by Rail operators within the NCTD portion of the LOSSAN corridor, 2005 and projected 2020.

<u>Rail Operator</u>	<u>Current (2005)</u>	<u>Future (2020)</u>
NCTD (Stuart Mesa sout.	11	27
Metrolink (OTC north)	6	9
BNSF (entire length)	2 to 4	5 to 6
Amtrak (entire length)	11 to 12	16
Total trains	30 to 34	57 to 58

Detailed information on each rail service, and the related benefits of the project, are provided below.

Amtrak Pacific Surfliners

Amtrak's Pacific Surfliner operates 22 to 24 trains per day, seven days per week, between Los Angeles Union Station and San Diego, and all travel through the project area. Amtrak reports that in FY05, an estimated 1,378,300 passengers traveled through the O'Neil Flores route segment. This ridership has grown 37 percent in the past three years. Amtrak reports that the average trip length of passengers in this corridor is 80 miles. Based on this data, the Pacific Surfliner is providing over 110 million passenger miles per year, which would be up to 110 million vehicle miles traveled per year in private vehicles were it not for this inter-city service, resulting in a tremendous environmental benefit. To maintain and enhance this benefit, reliable operations through improvements such as O'Neil – Flores are needed.

Metrolink Commuter Trains

Metrolink currently operates six daily commuter trains between Oceanside Transit Center and downtown Los Angeles, traversing the O'Neil – Flores project limits, plus additional trains that start at points north of Camp Pendleton. In addition, Metrolink operates the Inland Empire – Orange County line with 30 trains per day serving portions of the Orange County corridor north of Camp Pendleton. All of these trains would benefit directly or indirectly from the O'Neil - Flores project by helping all trains in the corridor to stay on schedule.

These combined services, and related Metrolink riders on Amtrak trains using Metrolink passes, have shown a 29% increase in overall ridership in the past three years and are currently carrying almost 19,000 passengers per day. With average passenger trip lengths of 38.2 miles (Orange County Line) and 32.1 miles (Inland Empire – Orange County Line), these services together are providing over 111 million passenger miles per year, which would be up to 111 million vehicle miles traveled per year in private vehicles were it not for these services. This huge environmental benefit requires that train travel times remain competitive and reliable, through double-track projects such as the O'Neil – Flores project.

Metrolink Beach Trains

In addition to the regular weekday commuter trains, Metrolink operates special weekend "Beach Trains" each Saturday and Sunday during the summer months of July, August, and September. The schedules provide six trains each weekend day, with a southern terminus at Oceanside Transit Center, just two blocks from the beach. This beach train program is providing up to 2,000 passengers per weekend a direct access to the beach from Inland San Bernardino, Riverside, and Orange County areas.

NCTD Coaster Commuter Trains

NCTD's Coaster commuter rail service provides 22 to 26 trains per weekday, depending on special events and schedule in effect, between Oceanside Transit Center and downtown San Diego. Eight trains are provided on Saturdays. Ridership on the Coaster has been growing steadily since its inception in 1995. Over the past three years, Coaster ridership has grown 12%, and is currently carrying an average of 6,184 daily passengers (August, 2005). At an average passenger trip length of 28.2 miles per passenger, the Coaster is providing over 44 million passenger miles per year, which would be up to 44 million vehicle miles traveled per year in private vehicles were it not for the Coaster. Here again is a huge environmental benefit for the San Diego region. And, of course, the Coaster is providing direct access to coastal communities along the line from Oceanside to San Diego, with stops in between at Carlsbad, Encinitas, and Solana Beach. Transit centers in Oceanside, Carlsbad, Encinitas, Solana Beach, and San Diego provide connecting transit services to the Coaster, enabling inland-area residents to transfer to the Coaster and reach coastal destinations.

While the Coaster would not be a direct user of the O'Neil Flores double track segment on Camp Pendleton, it would clearly be an indirect beneficiary. As rail traffic in Los Angeles has increased over the past few years, on-time performance of Coaster trains has been declining, from an average of 94% in FY02 to about 90% currently. Delay reports for the Coaster show that the number one cause of late Coaster trains is schedule interference from late-running Amtrak Pacific Surfliner trains. This single cause accounted for 41% of the total late Coaster trains in the first three months of this fiscal year. By improving the on-time reliability of Amtrak trains through projects such as O'Neil – Flores, Amtrak's trains will have less impact on Coaster trains and the Coaster should be able to improve its reliability. This in turn will improve the attractiveness of Coaster service and further reduce auto travel in the region, with the attendant environmental benefits.

It should be noted that commuter train customers, in particular, are very sensitive to on-time performance, and if schedules are not reliable, they will reduce their use of the service. NCTD experienced this directly in December, 2004, when a BNSF freight train derailed in the Miramar area and severely damaged the connection to an important passing track. Due to loss of use of this one passing track, the Coaster lost 22 percent of its ridership over the following two months, as some train service was cancelled and many trains ran about 10 minutes late. It took several more months after repairs were completed to recover the ridership lost during this period. This real-world experience shows that passing tracks play a critical role in maintaining rail service reliability and retaining the ridership levels that contribute environmental benefits.

BNSF Freight Trains

Burlington Northern & Santa Fe Railroad currently operates 2 to 4 freight trains per day in the corridor between the Orange County line and San Diego, through the area where O'Neil – Flores will be constructed. Unlike the passenger trains, BNSF does not operate on a specific schedule, except that they are excluded during AM and PM peak commuter periods. As a result, their irregular schedules can wreak havoc with scheduled commuter and inter-city trains during mid-day and evening periods, and on weekends. Passing tracks, such as the long new segment made possible by O'Neil – Flores, are critical to providing a means for the faster passenger trains to meet or pass the slower moving freights, thus helping all services to stay closer to schedule and/or recover schedule delays.

Conclusion

For all of the reasons described above, the O'Neil – Flores double track project will generate and support significant environmental benefits, as well as operational improvements in reliability which are critical to attracting and maintaining passenger

rail ridership. The new 4.7 mile double track segment will reduce locations where trains idle during meets from four locations to two locations in this area, providing an environmental benefit. The new longer passing siding will also make possible "running meets", which shorten travel times, and make service more reliable, thus making passenger rail more attractive as a mode of transportation and reducing the environmental impacts of automobile travel through the new rail patronage.

This operational improvement will support the rapidly-growing ridership in the LOSSAN corridor, which takes thousands of commuters out of their automobiles and generates a reduction of up to 265 million vehicle miles traveled in the corridor per year. These services also provide thousands of inland Southern Californians with direct access to the beaches in Orange and San Diego Counties, both for regular weekday travel and for special train services such as Metrolink's summer "Beach Trains". For these reasons, we urge the California Coastal Commission to find the O'Neil – Flores double track project to be consistent with the Coastal Act, thus allowing this important transportation project to proceed.

The Commission agrees and finds that the proposed project would, both individually and cumulatively, provide public access and recreation benefits, both through reducing traffic congestion along the coast and bringing inland visitors to the coast, and is therefore consistent with the public access and recreation policies (including Sections 30210 and 30252) of the Coastal Act.

B. Environmentally Sensitive Habitat Areas. Section 30240 of the Coastal Act provides that:

- (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

In addition, Section 30107.5 defines "Environmentally sensitive area" as follows:

"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

The widened railroad bed fill slopes will permanently displace up to 2.96 acres of natural habitat communities (with temporary impacts to 2.77 acres), including: upland vegetation (Diegan coastal sage scrub, valley needlegrass grassland, and non-native grassland)), and wetlands (southern willow scrub and mulefat scrub)(Exhibit 4). NCTD surveys showed several environmentally sensitive species occurring in the area, including the California gnatcatcher, the least Bell's vireo, and vernal pools containing several sensitive species, including Riverside and San Diego fairy shrimp. The project has been designed to avoid impacts to these sensitive species where feasible, as construction activities have been scheduled to avoid impacts to nesting California gnatcatchers and least Bell's vireos. NCTD has incorporated soil nail walls into the trackbed embankment design to enable the project to avoid vernal pool impacts (containing federally listed as endangered Riverside and San Diego fairy shrimp). Despite these avoidance measures, and while the improvements would be adjacent to existing tracks, the project would still be located within environmentally sensitive habitat areas as defined by the Coastal Act.

NCTD has undergone an extensive, multi-project, formal Section 7 Consultation with the U.S. Fish and Wildlife Service for this project, and the Fish and Wildlife Service has issued a programmatic Biological Opinion¹, which includes and avoidance, minimization, mitigation, and monitoring measures. The Programmatic Biological Opinion (BO) covers the area between the north side of Marine Corps Base Camp Pendleton to southern Oceanside, which is subject to six double-track projects (the BO also includes review of construction, operations and maintenance activities). The BO addresses effects of the six projects on a number of species, including effects on the federally threatened coastal California gnatcatcher (*Poliophtila californica californica*: gnatcatcher), western snowy plover (*Charadrius alexandrinus nivosus*: snowy plover), and thread- leaved brodiaea (*Brodiaea filifolia*); and the federally endangered arroyo toad (*Bufo californicus*), brown pelican (*Pelecanus occidentalis*: pelican), least Bell's vireo (*Vireo bellii pusillus*: vireo), California least tern (*Sterna antillarum browni*: least tern), light-footed clapper rail (*Rallus longirostris levipes*: clapper rail), tidewater goby (*Eucyclogobius newberryi*: goby), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), Pacific pocket mouse (*Perognathus longimembris pacificus*: pocket mouse), salt marsh bird's beak (*Cordylanthus maritimus* ssp. *maritimus*), and San Diego ambrosia (*Ambrosia pumilla*: ambrosia). The six projects reviewed (the subject project is in bold) consist of:

Project	Length (miles)	Location
San Mateo Creek Bridge and Second Track Project	1.8	MP 207.4 – MP 209.2
Pulgas to San Onofre Second Track Project	5.8	MP 212.3 – MP 218.1
O'Neil to Flores Second Track Project	2.7	MP 218.1 – MP 220.8
Santa Margarita River Bridge Replacement	2.9	MP 222.8 – MP 225.3

¹ Programmatic Biological Opinion for the Rail Corridor from the Orange County Border South to Southern Oceanside for Operations and Maintenance, and Six Double-Track Projects in San Diego County, California (1-6-05-P-4123.2)

and Second Track Project		
San Luis Rey River Bridge Replacement and Second Track Project	0.6	MP 225.3 – 225.9
Oceanside Passing Track Extension	1.2	MP 227.2 – MP 228.4

Source: Table 3. Biological Opinion 1-6-04-P-4123.2.

The opinion anticipates a programmatic increase in number of trains and train speeds, expecting an increase in train volume to “almost double by 2020,” as follows:

Table 1. Number of trains operated by Rail operators within the action area for programmatic biological opinion 1-6-05-P-4123.2.

Rail Operator	Current (2005)	Future (2020)
NCTD (Stuart Mesa south)	11	27
Metrolink (OTC north)	6	9
BNSF (entire length)	2 to 4	5 to 6
Amtrak (entire length)	11 to 12	16
Total trains	30 to 34	57 to 58

Trains speed is anticipated to increase from a current average speed of 47 miles per hour (mph) to 63 to 69 mph from the construction of the proposed projects including those across Camp Pendleton and Oceanside, and ultimately up to up to 90 mph in urban areas and up to 110 to 124 mph across rural areas like Camp Pendleton (FRA and Caltrans 2004):

Table 2. Current train speeds versus future train speeds through Camp Pendleton and the City of Oceanside (mph).

Location	Current (average)	Current (maximum)	Future (average)	Future (maximum)
Orange County border	80	90	80	125
San Luis Rey River				
San Luis Rey River to OTC	50	90	50	90
OTC to Buena Vista Lagoon	60	90	60	90

For the subject O'Neil to Flores Second Track Project, the opinion assigns the following acreages of impacts and FWS-required mitigation of habitat types:

	O'Neil-Flores	Mitigation Ratio
CSS	1.44 acres	2:1
NNG	0.13 ac.	0.5:1
Native Grassland	0.74 ac.	2:1
SWS	0.62 ac.	3:1
MFS	0.03 ac.	3:1

CSS = coastal sage scrub, NNG = non-native grassland, SWS = southern willow scrub, and MFS = mulefat scrub.

Analyzing the impact of the subject project, the BO estimates the extent of "take" to be:

One (1) pair of coastal California gnatcatchers will be harmed by loss of habitat from the clearing of habitat for the construction of the O'Neil to Flores Second Track Project.

Two (2) pairs of least Bell's vireo may be harmed through reduced reproductive output due to the displacement from occupied habitat to habitat of insufficient size or quality from the construction of the O'Neil to Flores Second Track Project. No vireo will be harmed from maintenance activities or the construction of the other two capital improvement projects fully analyzed in this Opinion.

The BO elaborates:

Direct effects to one pair of gnatcatchers will occur from the permanent and temporary impacts of project construction. The permanent removal of 1.4 acres of CSS, 0.13 acre of non-native grassland, and 0.74 acre of native grassland will reduce the habitat available to breeding gnatcatchers. The linear nature of the project impact will result in a reduction of the edge of occupied gnatcatcher habitat resulting in a shifting of territories. The temporary removal of 1.24 acres of CSS will remove suitable habitat during construction and the first two years of revegetation efforts. Temporary impacts will eliminate a strip of vegetation along the rail corridor within occupied habitat and are expected to be reoccupied within a few years after initial revegetation efforts.

The vireo population at Aliso Creek includes at least three vireo territories within the action area immediately east of the track. The permanent and temporal loss of approximately 0.6 acre of wetland/ riparian vegetation on the east side of the track at Aliso Creek would likely result in the shifting of territories with the potential for a reduction in one territory. The vireo population at French Creek includes at least four territories within the action area east of the track. The permanent and temporal loss of approximately 0.5 acre of wetland/riparian vegetation on the east side of the track at

French Creek would likely result in the shifting of territories with the potential for a reduction in one territory. Since vireos are site tenacious, this reduction in available breeding habitat could cause increased competition for the remaining suitable habitat that could adversely affect one pair of vireo in Aliso Creek and one pair of vireo in French Creek. To reduce impacts to vireo at Aliso and French Creeks, all clearing of vegetation will occur outside of the vireo breeding season and all temporal impacts will be revegetated following completion of construction in these areas.

Effects from noise, lighting, and operational improvements are discussed above in the programmatic effects analysis. No access through the Las Pulgas Vernal Pool Area will occur for constructing the O'Neil Project. Therefore, there should be no adverse affects to San Diego and Riverside fairy shrimp from double track construction projects.

The mitigation measures required under the opinion include both programmatic and project-specific measures. The programmatic measures relevant to the species affected by this project are attached as Exhibit 5 and include requirements for:

1. limiting vegetation clearance to non-breeding seasons for migratory birds;
2. presence of on-site qualified biologist during construction and submittal of regular monitoring reports;
3. delineation of sensitive areas and temporary fencing to protect sensitive species;
4. implementation of Best Management Practices;
5. employee education;
6. refueling outside sensitive areas and prompt spill cleanup;
7. limiting staging areas to disturbed areas;
8. dust controls and trash debris collection;
9. limited if any night lighting, directionally shielded;
10. revegetation of disturbed areas with native species; and
11. offsite mitigation at the following ratios:
 - a. Coastal sage scrub, southern coastal bluff scrub, maritime succulent scrub, and native grass communities will be offset at a 2:1 ratio with any combination of off-site preservation, creation, or restoration of like habitat;
 - b. Non-native annual grasslands will be offset at a 0.5:1 ratio with any combination of off-site preservation, creation, or restoration of native habitat;
 - c. Riparian areas will be offset at a 3:1 ratio with any combination of off-site preservation, creation, or restoration of native habitat; and

Details of FWS' offsite mitigation requirements for the subject project are as follows:

- OP1 Permanent impacts to 1.44 acres of CSS and 0.74 acre of native grassland will be offset at a 2:1 ratio by purchasing and restoring 2.88 acres of CSS and preserving 1.48 acres of native grassland at the Foss Lake property currently being negotiated for purchase by Wildlands Inc. An additional 0.065 acre of non-native grassland will be purchased at the Foss Lake property to offset impacts to 0.13 acre of non-native grassland. A total of 4.425 acres of upland habitat will be purchased at Foss Lake.
- OP2 Permanent impacts to 0.62 acre of southern willow scrub and 0.03 acre of mulefat scrub will be offset by purchasing 1.85 acre (3:1 ratio) of southern willow scrub occupied by at least one pair of least Bell's vireo at the Foss Lake property.
- OP3 The Foss Lake property will be purchased by Wildlands Inc. and the entire site will be established as a Service approved mitigation bank (Bank). However, the 4.425 acres of upland habitat and 1.85 acre of wetlands will be purchased and preserved in perpetuity within the proposed Bank lands. Assurances of this purchase and preservation and management in perpetuity will be submitted to the Service prior to the start of construction.
- OP4 The restoration plan for the CSS and native grassland will be approved by the Service prior to the start of construction.

The FWS requirements also specify that NCTD will need to provide detailed implementation schedules and plans for offsite mitigation, including FWS pre-approval of plans, a 5-year maintenance and monitoring program, establishment of performance criteria (including remediation if performance is not met), annual reporting documenting progress/success, financing mechanisms, long term management, a draft management plan within three months of the acquisition of the conservation parcels or easement, a final management plan within six months, provisions for management and preservation in perpetuity (and if the conservation sites are transferred to a third party for long-term management, an endowment with sufficient funds to be established).

Specific on-site measures to mitigate gnatcatcher impacts during the construction period include:

1. surveying for gnatcatchers and timing construction to avoid the Gnatcatcher breeding season (February 15 to September 1) to the extent practicable, unless the NCTD documents that the habitat to be affected is not occupied by the gnatcatcher;

2. avoiding noise for construction activities adjacent to occupied gnatcatcher habitat exceeding 60 decibels (dB(A) L_{eq}) and including noise attenuation structures where necessary to attain this goal; and
3. noise monitoring during the gnatcatcher-nesting season and be reported daily to the Service.

The BO requires similar measures addressing surveying, timing, lighting, noise, and monitoring for least Bell's vireo impacts.

Concerning water quality, the BO requires Best Management Practices, to be contained in water quality plans (Storm Water Management Plan, Storm Water Pollution Prevention Plan, and Water Pollution Control Program), to reduce the probability of erosion/siltation or spill of chemicals/fuels that could potentially affect sensitive habitat areas downstream. The plans would need to be prepared by a biologist, include photographs of installed BMPs, and be approved by FWS prior to construction.

In response to the Commission staff's request for more details on the offsite mitigation bank, NCTD states:

The project is anticipated to need 6.375 acres of mitigation Wildlands will provide AMTRAK 6.375 acres of mitigation at the 61.1-acre Foss Lake Site located approximately 7.2 miles from the project site and 5.9 miles from the coast (Figure 1 [Exhibit 6]). The mitigation site is located northwest of Douglas Drive between the Oceanside Municipal Golf Course and the Pilgrim Creek Mitigation Bank (Figures 2 and 3 [Exhibit 6]). Other managed open space [which] borders the site to the south and north and Camp Pendleton is in close proximity to the north (Figures 2 and 3 [Exhibit 6]).

Nine vegetation communities currently occur on the Foss Lake site including disturbed alkali marsh, southern willow scrub, mulefat scrub, freshwater marsh, seasonal open water, Isocoma scrub, nonnative grassland, and disturbed and ruderal areas (Figure 4). No sensitive plant species have been detected and none are expected to occur. Further botanical and other studies will be conducted as part of the detailed mitigation planning. One state and federally-listed species, the least Bell's vireo (LBV) occurs on site (Figure 4 [Exhibit 6]).

Prior to Wildlands, Inc. (Wildlands) entering into the process of acquiring the site, portions of the site were utilized as off-site mitigation for several development projects. Of the 61.1 acres, approximately 46.7 acres is available for AMTRAK and other future mitigation. Wildlands is currently in the early study and design phases for the property.

It is Wildlands' intent to develop the unencumbered portions of the site into a mitigation bank.

Wildlands will provide AMTRAK with the proposed 6.375 acres of mitigation in the areas shown in Figure 5. The 2.88 acres of mitigation for coastal sage scrub (CSS) will be accomplished through the preservation of 1.69 acres of Isocoma scrub, and the creation/restoration of 1.19 acres of CSS along the margins of the southern half of the site. Mitigation for nonnative grassland (NNG) will consist of 0.065 acre of NNG preservation. Mitigation for native grassland will be accomplished through the restoration of 1.48 acres of Distichlis spicata-dominated grassland. Native grasses will also be included in the hydroseed mix for the CSS restoration areas. The 1.95 acres of mitigation for southern willow scrub and mulefat scrub will be accomplished through the preservation of 1.95 acres of LBV-occupied riparian habitat along Pilgrim Creek.

This narrative is intended as a preliminary description of the mitigation to be provided. A Habitat Mitigation and Monitoring Plan (HMMP) will be developed with detailed information on design goals and objectives, specifics of the restoration methods, maintenance and monitoring strategies, and long-term management techniques and endowment-funding mechanisms. We are proposing that the HMMP will be submitted to all permitting agencies within 120 days of the start of construction of the O'Neil-to-Flores project.

The BO concludes that, cumulatively, and with the mitigation measures required:

... it is the Service's biological opinion that the projects, as proposed, are not likely to jeopardize the continued existence of the coastal California gnatcatcher, least Bell's vireo, tidewater goby, arroyo toad, Riverside fairy shrimp, or San Diego fairy shrimp; nor adversely modify designated critical habitat for the gnatcatcher or tidewater goby. Therefore the O'Neil to Flores Second Track Project, Santa Margarita Bridge and Second Track Project, and the Oceanside Passing Track Extension Project will not likely jeopardize the continued existence of the coastal California gnatcatcher, least Bell's vireo, and tidewater goby nor adversely modify designated critical habitat for the tidewater goby. We present this conclusion based on the following reasons:

Coastal California Gnatcatcher

- 1. Faster and more frequent trains may injure or kill one gnatcatcher every five to ten years due to vehicle strikes. The loss of a single individual every five to ten years will not significantly affect the gnatcatcher population on Camp Pendleton.*
- 2. Up to five of gnatcatchers may be displaced to an area where reproductive output could be reduced due to inadequate habitat size or quality. The loss of reproductive*

output from two to three pairs of gnatcatchers will not significantly affect the gnatcatcher population of Camp Pendleton.

3. *The permanent loss of approximately 15.4 acres and temporary loss of up to 15 acres of suitable occupied habitat, including 2.6 acres of designated critical habitat, is not large relative to the extent of designated critical habitat remaining over the coastal California gnatcatcher's range and is not expected to significantly decrease the long-term viability of the gnatcatcher or designated critical habitat. The loss of 2.6 acres of designated critical habitat will not affect the overall function and conservation role of critical habitat Unit 6.*
4. *The anticipated permanent loss of occupied CSS/MSS will be offset at a 2:1 ratio through the restoration and preservation of CSS/MSS at a site to be determined. Temporary impacts will be revegetated on-site.*

Least Bell's Vireo

1. *Faster and more frequent trains may injure or kill one vireo every five to ten years due to vehicle strikes. The loss of a single individual every five to ten years will not significantly affect the vireo population on Camp Pendleton.*
2. *Four pairs of vireos may be displaced to an area where reproductive output could be reduced due to inadequate habitat size or quality. The loss of reproductive output from three to four pairs of vireo will not significantly affect the vireo population of Camp Pendleton.*
3. *The permanent loss of approximately 4 acres and temporary loss of less than 2 acres of suitable occupied habitat is not large relative to the extent of habitat remaining over the least Bell's vireo's range and is not expected to significantly decrease the long-term viability of the vireo.*
4. *The anticipated permanent loss of occupied scrub/shrub and forested wetlands will be offset at a 2:1 ratio through the restoration and preservation of scrub shrub and forested wetlands at Foss Lake and sites to be determined. All temporary impacts will be revegetated on-site.*

Also, NCTD has agreed to the Commission staff's request that it will provide the final mitigation plans, revegetation plans, and monitoring plans to the Executive Director for review and concurrence, prior to any use (operation) of the improved tracks. Finally, as is the case for Commission consistency review, the FWS BO contains a "reopener" provision in the event circumstances change, including a greater extent of "take" or lack of success of the on- or off-site mitigation.

One concern over the offsite mitigation package is that it is a combination of acquisition, preservation, and new habitat creation, and while the Fish and Wildlife Service indicates the currently proposed mitigation would provide valuable habitat benefits, the habitat mix does not include a minimum of 1:1 creation of new coastal sage scrub and wetland habitat compared to the project impacts. The Commission historically has required at least 3:1 ratio for coastal sage scrub mitigation, and at least 1:1 habitat *creation* (i.e., no net loss) and has not relied on acquisition alone to offset sensitive habitat and wetland impacts. Only fairly minor increases in mitigation would need to be provided to meet this policy goal; NCTD would need to provide an additional 0.25 acres of coastal sage scrub habitat creation and 0.65 acres of wetland creation to assure no net loss of either of these habitats, and to increase the total ratio package (i.e., acquisition plus preservation plus and new habitat) for coastal sage scrub by an additional 1.44 acres to bring the project into compliance with the ESHA and wetland mitigation requirements of the Coastal Act. Therefore, the Commission is conditionally concurring this consistency certification to require that the mitigation package include this additional habitat creation. (If NCTD does not agree to the condition, then the Commission's decision is treated as an objection and NCTD has the right to appeal the decision to the Secretary of Commerce.)

With the avoidance, minimization and monitoring measures incorporated into the project, (including but not limited to the requirements of the FWS BO), the Commission finds that, if modified in accordance with the condition on page 7, the project would be consistent with several of the requirements of Section 30240 that the project "protect against any significant disruption of environmentally sensitive habitat values" and that it "be compatible with the continuance of those habitat areas." However, since the project is within occupied coastal sage scrub habitat, despite the avoidance, minimization, on- and off-site mitigation, and monitoring measures, the Commission finds the project must be considered to be sited within an environmentally sensitive habitat area (ESHA). As such, the Commission finds it inconsistent with the "allowable use" test of Section 30240(a) of the Coastal Act, which requires that "...only uses dependent on those resources shall be allowed within ... [environmentally sensitive habitat] areas." The project is not a use "dependent on the habitat resources." Therefore, the only way the Commission could concur with this consistency certification would be if it finds the project consistent with the Coastal Act through the "conflict resolution" provision contained in Section 30007.5.

As discussed in Section II.F of this report, not approving the project would be inconsistent with the public access, energy conservation, and air and water quality policies of the Coastal Act, because it would eliminate the project benefits to coastal resources from improving existing and future public access, reducing vehicle miles traveled, and improving air and water quality by reducing traffic congestion. Thus, the project creates a conflict between the allowable use tests of the environmentally sensitive habitat policy (Section 30240) (and, as discussed in the following section below, the wetlands policy)(Section 30233(a)) on the one hand, and the public access/air and water quality/energy conservation policies (Sections 30210, 30252,

30231 and 30253(4)) on the other. In the conclusory section of this report (Section F) the Commission will resolve these conflicts and determine that concurrence with this consistency certification, as conditioned, would, on balance, be most protective of significant coastal resources.

C. **Wetlands.** Section 30233 of the Coastal Act provides:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to [among other uses] the following: ...

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

NCTD states:

The proposed project will permanently impact federal and state jurisdictional wetlands. Permanent impacts to federal and state jurisdictional wetlands will be 0.65 acre.

One of the primary project design goals of the project was to avoid impacts to the vernal pool complexes (and their associated federally listed plant and animal species) that occur along a substantial portion of the project alignment. The project was designed to avoid all potential impacts to the vernal pool complexes and their watersheds. However, the linear nature of the proposed project, and the need to avoid these vernal pool complexes and watersheds and other sensitive upland resources (i.e., Diegan coastal sage scrub) resulted in a situation where permanent federal jurisdiction wetland (Southern willow scrub and Mulefat scrub) impacts will occur. The permanent wetland impacts are only 0.65-acre. There is no feasible less environmentally damaging alternative than the proposed project. Mitigation for the permanent impacts will be provided off-site at an approved wetlands mitigation bank. The Supplemental Information package, Attachment A – Section 2.0 provides additional discussion regarding mitigation.

This purpose is an incidental public service as outlined in Section 30233 (a)(5). The project has been designed to fulfill this purpose in the least environmentally damaging way possible. The mitigation measures outlined above have been developed to minimize any adverse environmental impacts. As such, the proposed project is consistent with Sections 30230, 30231, 30232, and 30233 of the California Coastal Act.

NCTD's wetland delineations considered both Army Corps, as well as the more stringent Coastal Act wetland definitions, and concluded that permanent wetland impacts would be 0.62 acres of southern willow scrub, and 0.03 acres of mulefat scrub, for a total permanent wetland fill impact of 0.65 acres. Temporary impacts (which would be restored) would be 2.77 acres. Due to this wetland fill, the project triggers the 3-part test of Section 30233(a) of the Coastal Act, which involve determining whether the project complies with the allowable use, alternatives, and mitigation tests of Section 30233(a).

Under the first of these tests, a project must qualify as one of the eight stated uses allowed under Section 30233(a). The Commission has considered minor expansions of existing roads, an airport runway (City of Santa Barbara, CC-058-02), and several past NCTD double tracking rail projects (including CC-55-05, CC-52-05, and CC-86-03) in certain situations to qualify as "incidental public service purposes," and thus allowable under Section 30233(a)(5), but only where no other alternative existed and where the expansion was deemed necessary to maintain existing traffic capacity.

The Court of Appeal has recognized this definition of incidental public service as a permissible interpretation of the Coastal Act. In the case of *Bolsa Chica Land Trust et al., v. The Superior Court of San Diego County* (1999) 71 Cal.App.4th 493, 517, the court found that:

... we accept Commission's interpretation of sections 30233 and 30240... In particular we note that under Commission's interpretation, incidental public services are limited to temporary disruptions and do not usually include permanent roadway expansions. Roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity.

NCTD maintains the project fits into this historically accepted interpretation, and the Commission accepted this assertion in concurring with NCTD's previously-submitted "double-tracking" projects on Camp Pendleton (CC-86-03 and CC-52-05, NCTD, San Onofre Area and Santa Margarita River, respectively). The Commission found:

Allowable Use Test - Coastal Act Section 30233(a). Section 30233(a) does not authorize wetland fill unless it meets the "allowable-use" test. Similar to the Commission decision regarding safety improvements at the Santa Barbara Airport (CC-58-01), the proposed project is an allowable use as an incidental public service because it is necessary to maintain existing passenger service. The second main track project is being proposed to streamline service for existing trains, and would not result in an increase in the number of trains (capacity) utilizing the tracks. Rather, the proposed project would improve mass transit services by providing more efficient services, thereby increasing the incentive for travelers to choose this mass transit option instead of personal automobiles. Therefore, any increase in utilization of the train service would be related to an increase in number of passengers aboard, rather than an expansion of train services.

In finding those projects 'limited expansions' and 'necessary to maintain existing capacity,' and thus an allowable use as an incidental public service under Section 30233(a)(5), the Commission reserved the concern over future double tracking proposals, stating that they would not necessarily continue to qualify under this section, because at some point with increasing numbers of double tracking proposals, the double tracking: (a) will no longer be limited; and (b) will contain enough length of a second set of tracks to in fact constitute an increase in capacity. However at that time and in those locations the Commission found that the double tracking projects did not meet either of these thresholds that would render the project ineligible for consideration as an incidental public service.

The piecemeal nature of NCTD's submittals has faced the Commission with a continuum of improvements, rather than a single unified project, which has made the determination of when increases in capacity are triggered a difficult one. To assist in this determination the Commission staff has requested information both about future double tracking proposals NCTD (or other proponents) are considering or planning for, and about documenting the public access benefits of improving public transit. On the first request, NCTD states future double-tracking proposals on Camp Pendleton would likely only be part of more comprehensive transportation improvement programs such as Los Angeles-San Diego Rail Corridor Agency (LOSSAN) and/or California High Speed Rail Authority projects. NCTD states:

Currently, no additional future double-track projects have been identified by NCTD to be constructed within the Camp Pendleton area. It should be noted, however, that NCTD performs railroad maintenance-of-way activities on a continuous basis, is required to respond promptly to emergency situations as they may occur along the railroad right-of-way, and is mindful of pursuing potential opportunities that may improve railroad operations. As such, it is possible that double-tracking projects may arise in the future as individual projects or as part of comprehensive transportation improvement programs, such as LOSSAN and/or the California High Speed Rail Authority.

On the second request for individual and cumulative benefits, NCTD has provided the detailed discussion contained on pages 10-14 above, which establish that the project will benefit public access. This discussion, combined with the programmatic operational discussion contained in the Fish and Wildlife Service's Biological Opinion (see pages 15-16 above), make it clear that the numbers and speeds of trains are going to increase, if not individually from this project, then certainly cumulatively based on currently planned improvements, leading the Commission to conclude that the project is likely to increase capacity. If it increases capacity, it does not qualify as an allowable use under Section 30233(a) as an incidental public service, and none of the other eight allowable uses in Section 30233 apply. Therefore, as discussed in the previous section of this report (Section B, and with elaboration in Section F), the only way the Commission could find the project consistent with the Coastal Act would be through the "conflict resolution" provision (Section 30007.5).

Turning next to alternatives, NCTD looked at but rejected several alternatives to the proposed action, including the No Action alternative, “as infeasible and not meeting the project’s purpose and need, stating:

***Alternative routes.** The LOSSAN corridor between Los Angeles and San Diego, in which the proposed project is located, has been an active rail corridor for 113 years. It plays a vital role in the transportation of people and freight between these two cities and points in between. Interstate 5, another transportation corridor, runs adjacent to the project within 152.4 meters (500 feet) of the tracks, through most of its length. Building a new mainline in a new corridor was rejected due to prohibitive cost and potentially major environmental impacts.*

***Build the new second track entirely within the existing R/W [right-of-way].** Under this alternative, ... [NCTD] would construct the new second mainline to the east of and entirely within the existing NCTD/SDNR R/W. This alternative proposes the use of retaining walls to minimize cut and fill slopes in order to maintain all construction activities within the existing R/W. Since all project construction would be designed to stay within the existing R/W, no easements would be required for this alternative, and the existing gas main would not require relocation. This alternative was rejected due to the limited amount of funds available to the project. The retaining walls required for implementation of this alternative would far exceed the available funding for the project. Therefore, the alternative is considered to be economically impracticable.*

***Build the new second track on the west side of the existing track.** Under this alternative, ... [NCTD] would build the new second mainline track on the west side of the existing track, rather than the east side as proposed in the proposed project description. Several physical constraints cause this alternative to be rejected from further consideration.*

First, the existing sidings are located on the east side of the existing track. Building the second mainline track on the west side would require “reverse curves” to transition the track locations to tie into the existing sidings. These reverse curves can degrade the ride quality and passenger comfort, potentially resulting in reduced ridership. Reverse curves also require additional track maintenance, resulting in higher maintenance costs.

Second, the support piers for the existing overhead bridge at MP 219.6 poses a constraint on the proposed new track location. The current distance from the existing track to the westernmost support pier is 3 meters (9.83 feet). The current distance from the existing track to the easternmost pier is 7.60 meters (24.92 feet). The new track would be constructed 4.57 meters (15 feet) from the existing track, in accordance with Amtrak standard criteria. Since the new track could not fit between the westernmost

bridge support pier and the existing track, it must be constructed on the east side of the existing track where sufficient room is available. The bridge is also the only access for heavy military equipment to training areas west of the rail corridor. Rebuilding the bridge would be economically impractical and would cause unnecessary impediments to military training exercises during construction.

Third, the existing MCI-Worldcom Fiber Optic telecommunications line is located on the west side of the existing track and would need to be relocated through the entire project length, rather than 640.08 meters (2,100 feet) as is proposed. This would result in prohibitive project costs.

Addressing the No Project alternative, NCTD states:

Under the No Project Alternative, Amtrak would not build the new second mainline track between CP O'Neil and CP Flores. All existing structures would remain as they currently are and no changes to the existing mainline track, sidings or gas main would occur. No construction activities would occur and all environmental impacts identified for the Preferred Alternative would be avoided. However, without this project, reduced travel times through high-speed train meets and passes, and increased operational efficiency and service reliability are unlikely to occur in the project limits. As a result, people would be less likely to turn to passenger rail as an alternative travel mode to the personal automobile. The No Project alternative does not meet the project purpose and need.

Moreover, as discussed in the previous section of this report, where design features are feasible that would avoid wetland impacts (such as the soil nail wall design which eliminates any fill of highly sensitive vernal pool habitat), NCTD has included avoidance measures to protect wetlands and has scheduled the construction period to minimize impacts to environmentally sensitive habitat (i.e., outside the gnatcatcher and least Bell's vireo nesting seasons). The Commission agrees with NCTD that the project represents the least environmentally damaging feasible alternative and is therefore consistent with the alternatives test of Section 30233(a).

Concerning the mitigation test, NCDT proposes 3:1 mitigation ratios for permanent wetland losses and revegetation on-site for any temporary disturbances. The mitigation program is outlined in detail in the previous section (Section B) of this report; offsite mitigation for the Southern willow scrub (0.62 acres), and Mulefat scrub (0.03 acres) impact would be the purchase of 1.85 acre (3:1 ratio) of southern willow scrub occupied by at least one pair of least Bell's vireo at the Foss Lake property, to be purchased by Wildlands Inc., with the site to be established as an FWS-approved mitigation bank, and with the 4.425 acres of upland habitat and 1.85 acre of wetlands to be purchased and preserved in perpetuity.

As discussed in the habitat section above (Section II.B), one concern over the offsite mitigation package is that it is a combination of acquisition, preservation, and new habitat creation, and while the Fish and Wildlife Service indicates the currently proposed mitigation would provide valuable habitat benefits, the habitat mix does not include a minimum of 1:1 creation of new coastal sage scrub and wetland habitat compared to the project impacts. The Commission historically has required at least 1:1 habitat creation and has not relied on acquisition alone to offset sensitive habitat and wetland impacts. Only fairly minor increases in mitigation would need to be provided to meet this policy goal; NCTD would need to provide an additional 0.25 acres of coastal sage scrub habitat creation and 0.65 acres of wetland creation to assure no net loss of either of these habitats, and to increase the total ratio package (i.e., acquisition plus preservation plus and new habitat) for coastal sage scrub by an additional 1.44 acres to bring the project into compliance with the ESHA and wetland mitigation requirements of the Coastal Act. Therefore, the Commission is conditionally concurring with this consistency certification to require that the mitigation package include this additional habitat creation. (If NCTD does not agree to the condition, then the Commission's decision is treated as an objection and NCTD has the right to appeal the decision to the Secretary of Commerce.)

In addition, NCTD has agreed to the Commission staff's request that it will provide the final mitigation plans, revegetation plans, and monitoring plans to the Executive Director for review and concurrence, prior to any use (operation) of the improved tracks. With this commitment and the above measures, and the Commission concludes that, if modified in accordance with the condition on page 7, the project would provide adequate mitigation and be consistent with the alternatives and mitigation tests, but not with the allowable use test (for the reasons explained above), of Section 30233(a) of the Coastal Act.

D. Water Quality. Section 30231 of the Coastal Act provides for the protection of water quality resources. That section provides:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

NCTD has included commitments for water quality protection in its consistency certification, stating:

The potential impacts to water quality are limited to the construction phase of the project only. Pollutants of concern during construction activities are erosion and sedimentation, and potential for hazardous materials spill or leakage from construction vehicles. In the

long-term, at Mile Post 220.2 (French Creek), which is one of three areas along the project alignment that will impact jurisdictional wetlands, the project proposes to realign 103 feet of the drainage channel to restore positive drainage. Overall, this action is anticipated to improve hydrology function and water quality in French Creek through regular water flow, and the improvement of operational efficiency will have a beneficial effect by reducing the reliance on the automobile.

The Supplemental Information package, Attachment A – Section 3.0 provides a detailed analysis of the project's construction and post-construction best management practices (BMPs). The proposed project would include the preparation of a Storm Water Pollution Prevention Plan (SWPPP) by the project engineer, in compliance with the required National Pollution Discharge Elimination System (NPDES) general permit issued by the Regional Water Quality Control Board (RWQCB), identifying construction and post-construction best management practices (BMPs) to protect water quality. The temporary and permanent BMP's will conform to the Caltrans Storm Water Quality Handbook, Construction Site Best Management Practices Manual, November 2000.

After the project construction is completed, temporarily impacted areas will be reseeded with a hydroseed mix at the completion of project construction. The proposed hydroseed mix was previously approved by the U.S. Fish and Wildlife Service in conjunction with the recently approved, and constructed San Onofre Double Track project.

Stormwater runoff will also be improved by reducing the amount of non-point source water pollution generated by existing and future automobiles utilizing this corridor (i.e., I-5). The purpose of the project is to construct a new mainline railroad track between Control Point O'Neil and Control Point Flores and rehabilitate existing railroad track siding from Control Point Flores to Control Point Pulgas to mainline standards which will allow for reduced travel times through higher-speed meets and passes. This will increase operational efficiency and reliability. As a result, people would be more likely to turn to passenger rail as an alternative mode to the personal automobile. Passenger rail vehicles are much cleaner than highway vehicles with respect to oil and grease drips. This is partially attributed to the fact that any drips from rail vehicles fall into a ballasted ROW, where gravel and soil act as a filter to prevent runoff from moving contaminants and because rail transportation involves less oil, grease, and other hydrocarbons than automobiles. Automobiles are a significant source of hydrocarbons, which are then flushed by runoff from the I-5 area into nearby water bodies. It is likely the proposed project will increase passenger service along this corridor thereby reducing automobile vehicle miles traveled and the corresponding non-point source emissions.

Concerning hazardous material and spills, NCTD states:

Contractor operations are not anticipated to use or generate any unusual or significant amounts of hazardous wastes. All wastes generated will be disposed of at an approved disposal site outside of the Marine Corps Base Camp Pendleton. Hazardous materials temporarily held on-site will be stored in secure areas and in properly placarded containers. No hazardous materials will be stored within 150 feet of sensitive areas (water wells or washes) along the project. Potentially hazardous materials, which may be present on-site during construction of the project, are those generally associated with the operation and maintenance of vehicles and equipment. Though these potentially hazardous materials may be present on-site, the amount of material will be limited due to the mobile nature of the installation activities. The Contractor will develop a Spill Prevention Containment and Countermeasure (SPCC) Plan before construction begins.

In addition, the FWS BO referenced in Section II.B above requires:

Storm Water Pollution Prevention Conservation Measures

- BMP1 BMPs employed during maintenance activities will follow applicable guidelines and be detailed in NCTD's workplan. The BMPs will reduce the probability of erosion/siltation or spill of chemicals/fuels that could potentially affect sensitive habitat areas downstream.*
- BMP2 BMPs employed during construction will follow applicable guidelines and be detailed in the work-related Storm Water Management Plan, Storm Water Pollution Prevention Plan, and Water Pollution Control Program. Specific plans will be reviewed by a biologist and modified, if necessary, prior to implementation. The biologist will have the ability to suggest changes to reduce the probability of erosion/siltation or spills of chemicals/fuels that could potentially affect sensitive habitat areas downstream. Photographs of installed BMPs will be submitted to the Service at least seven days prior to initial grading and clearing.*

Finally, NCTD has agreed to the Commission staff's request that it provide the submit the water quality plans referenced above to the Executive Director for review and concurrence, prior to construction. With these measures and commitments, the project will not cause significant water quality impacts, and will in fact improve water quality, and the Commission finds the proposed project consistent with the water quality policy (Section 30231) of the Coastal Act.

E. Air Quality and Energy Consumption. Section 30253(4) provides that new development shall "minimize energy consumption and vehicle miles traveled." In reviewing NCTD's proposal for Oceanside-Escondido Rail Project referenced earlier in this report (CC-029-02), the Commission noted that the public transit project: (a) would reduce auto-related

air emissions, thereby contributing to the improvement of regional air quality; (b) as part of a regional public transportation system, including bus service, light-rail and commuter trains, and trolleys, the project would increase acceptance of public transit as a desirable mode of transportation; and (c) as its acceptance and use increases, public agencies may be motivated to further improve the public transit system and these improvements will result in corresponding reductions in traffic congestion. The Commission noted:

The air quality benefits [cited in that project's EIR²] are partially offset by increased pollution caused by the train's use of diesel fuel. However, as described in the Access Section above, the proposed project will probably have significant VMT reductions as the regional mass transit program expands and as public transit becomes a more accepted mode of transportation. As the percentage of traffic accommodated by mass transit grows, there will be a corresponding reduction in air pollution from automobiles. However, there will not be a corresponding increase in air pollution as ridership of the rail system grows. As ridership grows there will be more reductions in air quality impacts from automobiles.

In conclusion, the Commission finds that the proposed project will reduce energy consumption and improve air quality.... Therefore, the Commission finds that the project is consistent with Section 30253 of the Coastal Act, and thus with the energy consumption and air quality policies of the CCMP.

For the subject project, NCTD estimates the project's air quality benefits to include reduced idling time leading to reduced emissions of pollutants. NCTD estimates, for example, that reductions in the ozone precursor emissions NO_x (oxides of nitrogen) to represent the equivalent of 5,000 vehicle-mile emissions on nearby I-5. The Commission finds that the proposed project will reduce energy consumption and improve air quality and is therefore consistent with Section 30253(4) of the Coastal Act.

F. Conflict Between Coastal Act Policies. Section 30007.5 of the Coastal Act provides the Commission with the ability to resolve conflicts between Coastal Act policies. Section 30007.5 provides:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature

² Estimated in that project's EIR to reduce automobile traffic by approximately 132,000 vehicle miles traveled (VMT) per day (or 28.5 million VMT per year), and an estimated energy savings of 174 billion Btu of energy per year.

declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

1) Conflict. In order for the Commission to consider balancing Coastal Act policies, it must first establish that there is a conflict between these policies. The fact that a project is consistent with one policy of the Coastal Act and inconsistent with another policy does not necessarily result in a conflict. Rather, the Commission must find that to object to the project based on the policy inconsistency would result in coastal zone effects that are inconsistent with the Coastal Act.

As discussed previously (Sections II.B and II.C above), because the subject project would be located within occupied coastal sage scrub/gnatcatcher habitat, the project is located within an environmentally sensitive habitat area but is not consistent with the “allowable use” test of Section 30240(a) of the Coastal Act, which requires that “...only uses dependent on those resources shall be allowed within ... [environmentally sensitive habitat] areas.” In addition, because it would increase capacity, it does not qualify as an incidental public service under Section 30233(a)(5), Commission interpretations of which historically only allow transportation projects in wetlands where they are necessary to maintain *existing* capacity. Therefore, the only way the Commission could find the project consistent with the Coastal Act would be through the “conflict resolution” provision (Section 30007.5).

As described in the access section above (Section II.A), one of the project purposes/benefits is reduced traffic congestion relief on area highways. The Commission staff's request that NCTD elaborate on the congestion/traffic reduction features of the project elicited the NCTD discussion contained above on pages 10-14, which provides compelling evidence that the project would provide significant public access and recreation benefits, both through reducing traffic congestion along the coast and bringing inland visitors to the coast.

The Commission finds that traffic congestion interferes with access to the coastal recreational opportunities within northern San Diego County (including travelers from Los Angeles and Orange Counties). As traffic congestion increases with expected growth of the region, these access impacts will worsen, and when congestion increases, non-essential trips such as those for recreational purposes tend to be among the first to be curtailed. Thus, as the traffic increases, the ability for the public to get to the coast will become more difficult, which would result in a condition that would be inconsistent with the access policies of the Coastal Act.

As discussed in Sections D and E above, traffic increases that would occur if this project is objected to would also degrade air and water quality and result in a condition that inconsistent with the air and water quality policies of the Coastal Act, because they would exacerbate nonattainment status of the coastal air basin and adversely affect coastal water bodies. Section 30231 of the Coastal Act requires the maintenance and restoration of the

quality of coastal waters. Section 30253(4) provides for improved air quality and reductions in energy consumption and vehicle miles traveled. Section 30252 articulates that one of the Coastal Act's access goals is encouraging maintenance and enhancement of public access through facilitating the provision or extension of transit service. Thus, not only would objecting to this consistency certification be inconsistent with the access policies, but it would also result in adverse effects to coastal waters and the air basin and be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. The Commission therefore finds that the proposed project creates a conflict between allowable use tests of the ESHA/wetland policies (Sections 30240(a)/30233(a)) on the one hand, and the water quality/air quality/energy conservation/reductions in vehicle miles traveled/public access and transit policies (Sections 30231/30253(4)/30252) on the other.

2) Conflict Resolution. Having establishing a conflict among Coastal Act policies, Section 30007.5 requires the Commission to resolve the conflict in manner that is on balance most protective of coastal resources. In this case, the proposed project will result in the displacement of 2.18 acres of ESHA (coastal sage scrub and native grassland) and fill of 0.65 acres of wetlands. The affected habitat is adjacent to the existing rail line, and as the Fish and Wildlife Service noted in its Biological Opinion (see pages 21-22 above), the sensitive species to be affected are likely to be able to adapt to this relatively minor rail line widening. The more highly sensitive and more easily disturbed species (federally listed as endangered fairy shrimp in adjacent vernal pools) has been avoided by design modifications. Moreover, and as conditioned, adequate on-site and off-site mitigation is being provided to compensate for the ESHA and wetland losses.

On the other hand, as stated above, objecting to this consistency certification would result in conditions that would be inconsistent with the access policies (Section 30210), and would result in adverse effects to coastal waters and coastal the air basin and be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. In resolving the Coastal Act conflict raised, the Commission finds that the impacts on coastal resources from not constructing the project would be more significant and adverse than the project's ESHA and wetland habitat impacts, which would, as conditioned be adequately mitigated. The Commission therefore concludes that concurring with this consistency certification would, on balance, be most protective of coastal resources.

III. Substantive File Documents

1. CC-052-05, NCTD, Replacement of Santa Margarita River Railroad Bridge, Marine Corps Base Camp Pendleton.

2. Programmatic Biological Opinion for the Rail Corridor from the Orange County Border South to Southern Oceanside for Operations and Maintenance, and Six Double-Track Projects in San Diego County, California (1-6-05-P-4123.2)
3. CC-072-05, NCTD, after-the-fact consistency certification, emergency repairs, Bridge 208.6, San Onofre Creek, Marine Corps Base Camp Pendleton.
4. CC-86-03, NCTD, Second Track San Onofre Area, Camp Pendleton Marine Corps Base
5. CC-055-05, NCTD, Bridge replacement (single-track), Agua Hedionda Lagoon, Carlsbad.
6. CC-029-02, NCTD, Oceanside-Escondido Rail Project.
7. Pending NCTD Consistency Certification CC-048-04 (NCTD, Del Mar Bluffs Stabilization Project).
8. CC-064-99, Metropolitan Transportation Agency, Extension of Light-Rail, City of San Diego.
9. CC-058-02, City of Santa Barbara, modifications to the Santa Barbara Airport.
10. NCTD Coastal Development Permits 6-01-64 (NCTD - Balboa Avenue), 6-01-108 (NCTD - Tecolote Creek), 6-93-60 (NCTD - Del Mar), 6-94-207 (NCTD - Solana Beach), 6-93-106 (NCTD - Carlsbad), and 6-93-105 (NCTD - Camp Pendleton).

ATTACHMENT 4

CALIFORNIA COASTAL COMMISSION, FINDINGS FOR PASSING TRACK EXTENSION AND BRIDGES, CC-008-07 (NORTH COUNTY TRANSIT DISTRICT), ADOPTED JUNE 15, 2007

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



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STAFF REPORT AND RECOMMENDATION**ON CONSISTENCY CERTIFICATION**

Consistency Certification No.	CC-008-07
Staff	LJS-SF
File Date:	2/8/2007
3 Months:	5/8/2007
6 Months:	8/8/2007
Commission Meeting:	6/15/2007

APPLICANT:**North County Transit District****PROJECT
LOCATION:**

Milepost 227.2 to Milepost 228.4 of the Los Angeles – San Diego Railroad Corridor in the City of Oceanside, San Diego County (Exhibits 1 and 2).

**PROJECT
DESCRIPTION:**

Construction of a 1.2-mile-long extension of railroad passing track, and construction of a new railroad bridge and replacement of an existing railroad bridge over Loma Alta Creek.

**SUBSTANTIVE
FILE DOCUMENTS:**

See Page 27

EXECUTIVE SUMMARY

The North County Transit District (NCTD) has submitted a consistency certification for constructing a 1.2-mile-long extension of the Oceanside passing track between Mile Post (MP)

227.2 and MP 228.4 of the Los Angeles – San Diego (LOSSAN) railroad corridor on NCTD land in the City of Oceanside (San Diego County). The purpose of the project is to provide operational flexibility in order to increase service reliability and enhance on-time performance, and to help resolve current operational delays and enhance the capacity and utility of the LOSSAN corridor. The project consists of removing the existing timber trestle railroad bridge over Loma Alta Creek and constructing two new pre-cast concrete bridges, one for the passing track extension and one for the existing main line. In order to ensure continuous train traffic, the passing track bridge will be constructed prior to removal and replacement of the existing timber bridge. The project also includes modification of at-grade track crossings, installation of a new signal control point, new track cross-overs, a new turnout, and removal of an existing turnout. NCTD expects that the construction period will last approximately 18 months and is currently scheduled to occur between the summer of 2007 and December 2008. The Commission has previously concurred with similar NCTD double-tracking projects to the north on Marine Corps Base Camp Pendleton in the San Onofre area (CC-086-03), the O’Neil-Flores area (CC-004-05), and at the Santa Margarita River (CC-052-05).

Construction of the proposed project would affect tidal waters and brackish/freshwater wetlands. NCTD’s wetland delineation for the project considered both U.S. Army Corps of Engineers and the more stringent Coastal Act wetland definitions, and concluded that permanent wetland losses from concrete bridge support piers and the fill embankment slope along the west side of a section of the passing track extension north of Loma Alta Creek would total 4,442 sq.ft. Temporary construction-related impacts to open water and wetland habitat would total 1,840 sq.ft. The Commission has considered previous NCTD double-track projects (CC-086-03 and CC-052-05) which included wetland fill to qualify as “incidental public service purposes,” and thus an allowable use under Section 30233(a)(5) of the Coastal Act. However, the Commission found more recently in CC-004-05 that NCTD’s O’Neil-Flores double track project was not an allowable use due to the increase in track capacity likely to occur as a result of that project. Given that the proposed project will add an additional 1.2 miles of double-tracking in the corridor, the proposed Oceanside passing track extension (the fourth double-track project in the San Onofre-Oceanside corridor reviewed by the Commission) will also, cumulatively, serve to increase the capacity of the LOSSAN corridor. If a transportation project increases capacity, it does not qualify as an allowable use under Section 30233(a) as an incidental public service, and none of the other seven allowable uses in Section 30233 apply. The proposed project is not an allowable use under Section 30233(a) and thus the only way the Commission could find this project consistent with the Coastal Act, as it did for the O’Neil-Flores segment (CC-004-05), would be through the “conflict resolution” provision of Section 30007.5.

The proposed project is located entirely within the NCTD right-of-way, which provides adequate room for the track extension. Except for wetlands at the Loma Alta Creek crossing, the proposed project would not pass through or near environmentally sensitive habitat. Alternative passing track design layouts at the Oceanside project site (e.g., constructing an alternative main line route, placing the passing track on the east side of the main line) are not feasible due to prohibitive costs, engineering constraints, and environmental impacts, and the no-project alternative would not meet the project objective. The project is the least environmentally damaging alternative and is consistent with the wetland fill alternatives test of the CCMP

(Coastal Act Section 30233(a)). The consistency certification includes a wetland restoration plan to restore 0.3 acres of brackish/freshwater marsh in areas adjacent to Loma Alta Creek as mitigation for the permanent loss of 0.1 acres of wetlands due to construction of bridge piers in the creek and a fill embankment slope in wetland habitat north of the creek. The plan includes a description of existing site conditions, restoration methodology, performance criteria, monitoring and maintenance provisions, remediation measures, and annual reporting requirements. The project is consistent with the wetland mitigation requirements of the CCMP (Coastal Act Section 30233(a)).

The project includes appropriate measures to protect water quality, including implementation of a storm water pollution prevention plan, best management practices during construction, and post-construction site restoration. The project is designed in part to reduce automobile miles traveled and, consequently, pollutants from highway runoff, thereby benefiting water quality. The project is consistent with the water quality policies of the CCMP (Coastal Act Sections 30231 and 30232). The project will not adversely affect existing public access or recreation, but would, individually and cumulatively, provide public access and recreation benefits by reducing highway traffic congestion and improving public transit services within the coastal zone. The project is consistent with the public access and recreation policies of the CCMP (Coastal Act Sections 30210-12 and 30252). The project would also help to reduce automobile vehicle miles traveled and energy consumption and therefore is consistent with the air quality policy of the CCMP (Coastal Act Section 30253(4)). The project will not adversely affect public views to or along the shoreline or scenic coastal areas and is consistent with the public view policy of the CCMP (Coastal Act Section 30251). The project will not adversely affect cultural resources known to exist in the project area, includes provisions to stop work should resources be discovered during construction, and is therefore consistent with the cultural resource policy of the CCMP (Coastal Act Section 30244).

The project creates a conflict between the access/energy conservation/air and water quality policies of the CCMP on the one hand (Coastal Act Sections 30210, 30252, 30231, and 30253(4)) and the allowable use test of the wetland policy (Coastal Act Section 30233(a)) on the other. Although impacts have been avoided and minimized where feasible, and residual impacts would be mitigated, the project is not an allowable use under Section 30233(a) of the Coastal Act. If the Commission were to object to the proposed project based on wetland policy requirements, the result would frustrate public access and lead to conditions that are inconsistent with the access policies (Section 30210). Such an objection would also result in adverse effects to coastal waters and the air basin and be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. In resolving the Coastal Act conflict raised, the Commission finds that the impacts on coastal resources from not constructing the project would be more significant and adverse than the project's wetland habitat impacts, which will be mitigated. The Commission therefore concludes that, under Section 30007.5, concurrence with this consistency certification is consistent with the Coastal Act because it is, on balance, most protective of significant coastal resources.

STAFF SUMMARY AND RECOMMENDATION:

I. STAFF SUMMARY.

A. Project Description. The North County Transit District (NCTD) proposes to upgrade its existing railroad track system in northern San Diego County by constructing a 1.2-mile-long passing track extension, located 20 feet west of the existing main line track between Mile Post (MP) 227.2 and MP 228.4 in the City of Oceanside (**Exhibits 1 and 2**). The track extension will cross Loma Alta Creek on a pre-cast concrete bridge, and the existing main line timber trestle railroad bridge over Loma Alta Creek will be replaced by a pre-cast concrete bridge (**Exhibits 3-5**). The project also includes modification of at-grade track crossings at Oceanside Boulevard and Cassidy Street, installation of a new signal control point at MP 228.4, new cross-overs at MP 226.7, a new turnout at MP 228.4, and removal of an existing turnout at MP 227.2. The proposed passing track extension is designed for train operating speeds up to 90 mph and the proposed turnouts will permit speeds up to 60 mph. The project area is bounded to the north by Oceanside Boulevard, to the west by South Myers Street, to the east by South Cleveland Street and Broadway Street, and to the south by a distance of approximately 75 feet south of the southern end of Broadway Street above Buena Vista Lagoon. The project area is located on land owned by NCTD adjacent to industrial, residential, and recreational areas, and is approximately 700 feet inland from the Pacific Ocean.

The *Environmental Report* for the proposed project examines the existing and proposed bridges over Loma Alta Creek:

Currently, there is a timber trestle railroad bridge supporting the existing track over Loma Alta Creek. This bridge is a sixteen span 236-foot long, plus or minus, ballasted deck bridge supported by 102 timber piles. The Project consists of removing the timber trestle bridge and constructing two new bridges, one for the existing track and one for the extension of the passing track. A sewer line is located under the trestle bridge and will be in continuous service during the project.

In order to ensure continuous train traffic flow, the new pre-cast concrete bridge will be constructed before the removal of the existing bridge. Construction of each bridge is expected to take about six months, with six months or more between completion of the first bridge and start of construction of the second bridge. The bridge sub-structure work performed near or in Loma Alta Creek will take about eight weeks for each bridge. The timber piles for the existing bridge will be cut four feet below the creek bed level. The portion of the pile deeper than this level will be left in place in order to minimize disturbance to the creek bed. The timbers that are removed will be disposed of in accordance with applicable federal, state, and local regulations.

Both of the new bridges will be near identical. They will be constructed of pre-cast concrete, supported on reinforced concrete steel shell piles and consist of five spans. The piers of both bridges will be aligned to minimize impedance to water flow in Loma Alta Creek. Each pier will be composed of sixteen piles arranged in two columns of eight. Each

pile will be 18-inch diameter, steel encased, and constructed of reinforced concrete. Depending on soil conditions the piles will be driven approximately 55 feet into the creek bed and bank by pile driving equipment.

The piles will be tied together near grade by reinforced concrete footings. For each bridge, four piers and two abutments will support the five spans of the bridge. Each of the pier footings will be 9 feet wide, 19.5 feet long, and 3 feet thick, for a total footprint area of approximately 175 sq.ft. A small gap will separate the footing of the adjacent bridge. The abutments on both banks of Loma Alta Creek will have footings of 160 sq.ft. area each. The total area for all eight pier footings including the four abutments is approximately 2,040 sq.ft.

In situ concrete placement will be limited to the piles, pile footings, pile caps, and other minor structures of the bridges. The main girders and deck of the bridges will be pre-cast in facilities away from the construction site, transported and set in place using cranes. There will be no bridge false work over or in the creek bed.

Construction of the pier footings and abutments in the creek bed will require excavating the top three feet of the creek bed soil for concrete placement. A total of about 6,120 cu.ft. of material will be excavated for the eight piles and four abutments. About 1,500 cu.ft. of temporary fill will be deposited in an approximately 500 sq.ft. area around pier No. 4 in order to raise the level of channel bed above the water surface during installation of the pier. The other piers and abutments are on dry land during the dry months, when construction is planned; therefore, temporary fill is not expected to be required for the installation of these piers, although conservative estimates give a fill volume of approximately 500 cu.ft. over an area of approximately 200 sq.ft. for each pier This technique is simple and would avoid more expensive and invasive methods such as cofferdams. Temporary fill will consist of sandbags, or other erosion resistant borrow material, to allow construction in the submerged areas of pier Nos. 4 and 5. A total volume of about 2,000 cu.ft. will be used for this temporary fill.

Permanent and temporary fill will be placed into waters of the U.S. and wetlands to allow for the installation of concrete footings and abutments. A total of about 6,120 cu.ft. of permanent fill will be placed into the waters of the U.S. and wetlands for the bridge piers. This will permanently affect an approximate area of 2,040 sq.ft. (0.047 acres). Of the area permanently filled, about 350 sq.ft. (0.008 acres) are in waters of the U.S. and approximately 1,690 sq.ft. (0.039 acres) are in wetlands. A total of about 5,520 cu.ft. of temporary fill will be placed into waters of the U.S. and wetlands affecting a surface area of about 1,840 sq.ft. This temporary fill for construction staging and for pier construction will be removed after construction of the footings is complete.

In addition, approximately 2,402 square feet of wetland habitat would be permanently filled due to the construction of a fill slope to support a 240-foot-long section of the passing track extension immediately north of the Loma Alta Creek bridge. This brings the total area of permanent wetland fill to 4,442 sq.ft., or approximately 0.1 acres.

NCTD proposes to mitigate at a 3:1 ratio the project-related impacts to wetland habitat by restoring 0.3 acres of brackish water wetlands at the project site within the Loma Alta Creek floodplain. In addition, wetlands affected by temporary fill due to construction activities will be restored to pre-project conditions. A draft wetland restoration and revegetation plan was submitted with the consistency certification, and is discussed in detail in Section III.A of this report. The final restoration plan will be submitted to the Executive Director prior to the start of project construction.

The proposed project will use three staging areas during construction (**Exhibit 6**). A 200' by 50' general construction equipment storage area will be sited west of the mainline track, south of Ocean Boulevard. A 100' by 100' bridge construction equipment staging area will be sited east of the main track and north of Loma Alta Creek. Both of these staging areas are located on upland terrain devoid of environmentally sensitive habitat. The third staging area will support the crane and pile driving equipment used for constructing the piers and bridges. This 50' by 100' site is located on either side of the existing timber trestle bridge, and is within wetland habitat on the north bank of Loma Alta Creek.

NCTD expects that the construction period will last approximately 18 months and is currently scheduled to occur between the summer of 2007 and December 2008.

B. Background/Need. The subject railroad line has served coastal Southern California for 115 years. In the late 1800s, the Atchison, Topeka and Santa Fe railway (AT&SF) built the "Surf Line" railroad line between Los Angeles and San Diego. The North San Diego County Transit Development Board (NSDCTDB) purchased the Surf Line in 1995. The project corridor currently includes a single mainline track and several passing tracks and sidings within the North County Transit District (NCTD)/San Diego Northern Railway (SDNR) right-of-way. At present there are 60 miles of main line track between San Diego and the Orange County line, of which 19 miles are double-tracked. The track is used for train travel in the Los Angeles to San Diego (LOSSAN) corridor and which currently operates at near full capacity. Approximately 51 daily trains operated by NCTD, Amtrak, Metrolink, and BNSF railroad use the corridor and NCTD reports that train delays are common. Within most of the corridor only one mainline track is available for both northbound and southbound trains, and trains must therefore adhere to a fixed schedule in order to operate efficiently. However, when one train goes off schedule, the remaining trains must stop and wait on an existing siding for the first train to get back on schedule. This causes a cascading delay effect, negatively affecting on-time performance and service reliability. Increasing the amount of double track by connecting the existing sidings would allow trains to pass each other while underway, thus reducing overall train delays and providing improved, more reliable service.

The need for this project stems in part from the high levels of automobile congestion on Southern California's highway system. Caltrans' 2002-published California State Rail Plan, 2001-02 to 2010-11, articulates its vision for intercity passenger rail as achieving three objectives: (1) to "provide relief to highway and airway congestion" through reliable and efficient intercity rail service; (2) to promote intercity rail to "provide a rail transportation alternative to other travel

modes”; and (3) to “improve air quality, conserve fuel, and contribute to efficient and environmentally superior land use.” NCTD reports that he proposed Oceanside passing track extension project would increase the capacity of the corridor enough to reduce the number and duration of train delays, thus improving service reliability and inducing people to turn to passenger rail as an alternative travel mode to the personal automobile.

The Commission has previously concurred with three NCTD consistency certifications for double tracking in northern San Diego County: (1) the 2.6-mile-long Pulgas to San Onofre double tracking project at the north end of Camp Pendleton (CC-86-03); (2) the 2.9-mile-long Santa Margarita River double tracking project at the south end of Camp Pendleton (CC-52-05); and (3) the 2.7-mile-long O’Neil to Flores double-track project in central Camp Pendleton (CC-004-05)(**Exhibit 7**).

C. Procedures – Permitting Issue. The project triggers federal consistency review because it needs a U.S. Army Corps of Engineers (“Section 404”) permit. The Commission also believes it is subject to the permitting requirements of the Coastal Act; however, NCTD disagrees with this position. Notwithstanding this disagreement about whether a coastal development permit (CDP) is needed, the Commission concurs with this consistency certification because it is consistent with the Coastal Act. The Commission further notes that the NCTD has applied for a number of permits for its rail improvement activities in other sections of the coast, including CDP’s No.: 6-03-102-G (Agua Hedionda emergency repairs), 6-02-152 (San Luis Rey River bridge repair), 6-02-151 (Agua Hedionda bridge), 6-02-102 (Del Mar drainage outlets), 6-02-80 (Santa Margarita Bridge repair), 6-01-64 (Balboa Avenue), 6-01-108 (Tecolote Creek), 6-93-60 (Del Mar), 6-94-207 (Solana Beach), 6-93-106 (Carlsbad), and 6-93-105 (Camp Pendleton).

D. Applicant’s Consistency Certification. North County Transit District has certified that the proposed activity complies with California’s approved coastal management program and will be conducted in a manner consistent with such program.

II. Staff Recommendation:

The staff recommends that the Commission adopt the following motion:

Motion: I move that the Commission **concur** with North County Transit District’s consistency certification CC-008-07 that the project described therein is fully consistent with the enforceable policies of the California Coastal Management Program (CCMP).

Staff Recommendation:

The staff recommends a **YES** vote on the motion. Passage of this motion will result in an agreement with the certification and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

Resolution to Concur with Consistency Certification:

The Commission hereby **concurs** with the consistency certification made by North County Transit District for the proposed project, finding that the project is consistent with the enforceable policies of the California Coastal Management Program.

III. Findings and Declarations:

The Commission finds and declares as follows:

A. Wetlands and Environmentally Sensitive Habitat. The Coastal Act provides the following:

Section 30233(a). The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

...

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines

...

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing wetlands and estuaries shall maintain or enhance the functional capacity of the wetland or estuary.

Section 30240.

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The proposed passing track extension is located primarily within a highly developed urban landscape, except for the bridge crossing of Loma Alta Creek near the north end of the project corridor. Field surveys of biological resources within and adjacent to the corridor were conducted by NCTD biological consultants in June and December 2002, June 2003, and October 2006. The objectives were to survey vegetation composition and distribution, aquatic habitat,

water quality, and wildlife, and to determine if habitat for sensitive species was present. The project *Environmental Report* states that:

No federally or state listed threatened or endangered species are known to occur on the project site or within the waters of Loma Alta Creek . . . No species of endangered or threatened plants were observed during a habitat assessment survey . . . No special status plant species were observed in the project area and no habitat for non-aquatic endangered and threatened wildlife species was observed.

*The vegetation in most of the project area consists of ruderal vegetation dominated by non-native species . . . In the floodplain of Loma Alta Creek, vegetation is dominated by pickleweed (*Salicornia virginica*), saltgrass (*Distichlis spicata*), non-native Bermuda grass (*Cynodon sp.*), and non-native fivehorn smotherweed (*Bassia hyssopifolia*).*

...

Construction activities associated with the Oceanside Passing Track Expansion Project will occur in the NCTD right-of-way. With the exception of the portion of the project adjacent to Loma Alta Creek, vegetation and wildlife habitat are sparse due to maintenance by NCTD. Habitat for endangered or threatened wildlife species in the Project area, including Loma Alta Creek, is limited and degraded due to several activities including: channelization of the creek; development of access routes reinforced with roadbed material on the north side of the creek; and modifications made for the La Salina Wastewater Treatment Plant, Buccaneer park, La Salina Trailer Park, and other commercial facilities. Loma Alta Creek is not Designated Critical Resource Water nor does the state or federal government designate it as an area with particular environmental or ecological significance.

NCTD has undergone an extensive, multi-project, formal Section 7 Consultation with the U.S. Fish and Wildlife Service, and that consultation included the Oceanside passing track extension project. The Service issued a *Programmatic Biological Opinion for the Rail Corridor from the Orange County Border South to Southern Oceanside for Operations and Maintenance, and Six Double-Track Projects in San Diego County, California (1-6-05-P-4123.2)* on September 9, 2005, as amended on November 14, 2005. The *Biological Opinion* covers the area between the north side of Marine Corps Base Camp Pendleton to southern Oceanside, reviews on a programmatic level six double-track railroad projects, reviews on a project-specific basis three of the double-track projects (including the Oceanside passing track extension), and reviews construction, operations, and maintenance activities. The *Biological Opinion* includes avoidance, minimization, mitigation, and monitoring measures and concluded that the proposed Oceanside Passing Track Extension project is not likely to jeopardize any designated critical habitat of or the continued existence of the California coastal gnatcatcher, least Bell's vireo, tidewater goby, and arroyo toad. However, the *Biological Opinion* also provides conservation measures to avoid and minimize effects to threatened, endangered, or sensitive wildlife species potentially occurring in the project area, and includes general conservation measures, and conservation measures for temporary and permanent vegetation impacts (**Exhibit 8**). Conservation measures for the latter include requirements for a project-specific vegetation

restoration plan, a five-year maintenance and monitoring program, performance criteria and remediation (if necessary), and annual reports.

The Commission agrees with the findings in the NCTD *Environmental Report* and the U.S. Fish and Wildlife Service *Biological Opinion* that the only environmentally sensitive habitats that will be adversely affected by construction of the proposed passing track extension are Loma Alta Creek and adjacent brackish water wetlands. The proposed project includes the removal of the existing timber trestle railroad bridge and construction of two pre-cast concrete railroad bridges over Loma Alta Creek. NCTD's wetland delineation for the proposed project considered both U.S. Army Corps of Engineers and the more stringent Coastal Act wetland definitions, and concluded that permanent wetland losses from bridge support piers and the fill slope on the west side of the passing track extension north of Loma Alta Creek would total 4,442 sq.ft. (**Exhibits 9 and 10**). Temporary construction-related impacts to open water and wetland habitat would total 1,840 sq.ft. (A detailed description of the permanent and temporary wetland impacts from the proposed project is found on Page 5 of this report.) Due to this wetland fill, the project triggers the three-part test of Section 30233(a) which requires determining whether the project complies with the allowable use, alternatives, and mitigation tests of that section.

1. Allowable Use. Under the first of these tests, a project must qualify as one of the eight stated uses allowed under Section 30233(a). The Commission has considered minor expansions of existing roads, an airport runway (City of Santa Barbara, CC-058-02), and NCTD double tracking railroad projects (CC-086-03, CC-052-05) in certain situations to qualify as "incidental public service purposes," and thus allowable under Section 30233(a)(5), but only where no other feasible less damaging alternative exists and the expansion is necessary to maintain existing traffic capacity.

The Court of Appeal has recognized this definition of incidental public service as a permissible interpretation of the Coastal Act. In the case of *Bolsa Chica Land Trust et al., v. The Superior Court of San Diego County* (1999) 71 Cal.App.4th 493, 517, the Court found that:

... we accept Commission's interpretation of sections 30233 and 30240 ... In particular we note that under Commission's interpretation, incidental public services are limited to temporary disruptions and do not usually include permanent roadway expansions. Roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity.

NCTD states in the subject consistency certification that "The purpose of the project is to provide operational flexibility and increase service reliability and on-time performance of trains in the Los Angeles – San Diego Corridor. This purpose is an incidental public service as outlined in Section 30233 (a)(5)." The Commission has accepted this assertion in two previous concurrences with NCTD double track construction projects in northern San Diego County which involved fill of coastal waters and wetlands (CC-086-03 and CC-052-05). The Commission found in CC-052-05 that:

Allowable Use Test - Coastal Act Section 30233(a). Section 30233(a) does not authorize wetland fill unless it meets the "allowable-use" test. Similar to the Commission decision regarding safety improvements at the Santa Barbara Airport (CC-58-01), the proposed project is an allowable use as an incidental public service because it is necessary to maintain existing passenger service. The second main track project is being proposed to streamline service for existing trains, and would not result in an increase in the number of trains (capacity) utilizing the tracks. Rather, the proposed project would improve mass transit services by providing more efficient services, thereby increasing the incentive for travelers to choose this mass transit option instead of personal automobiles. Therefore, any increase in utilization of the train service would be related to an increase in number of passengers aboard, rather than an expansion of train services.

However, the Commission found more recently in CC-004-05 (NCTD, O'Neil to Flores double track) that:

In finding those projects [CC-086-03 and CC-052-05] "limited expansions" and "necessary to maintain existing capacity," and thus an allowable use as an incidental public service under Section 30233(a)(5), the Commission reserved the concern over future double tracking proposals, stating that they would not necessarily continue to qualify under this section, because at some point with increasing numbers of double tracking proposals, the double tracking: (a) will no longer be limited; and (b) will contain enough length of a second set of tracks to in fact constitute an increase in capacity. However, at that time and in those locations the Commission found that the double tracking projects did not meet either of these thresholds that would render the projects ineligible for consideration as an incidental public service.

The piecemeal nature of NCTD's submittals has faced the Commission with a continuum of improvements, rather than a single unified project, which has made the determination of when increases in capacity are triggered a difficult one. To assist in this determination the Commission staff has requested information both about future double tracking proposals NCTD (or other proponents) are considering or planning for, and about documenting the public access benefits of improving public transit. On the first request, NCTD states future double-tracking proposals on Camp Pendleton would likely only be part of more comprehensive transportation improvement programs such as Los Angeles-San Diego Rail Corridor Agency (LOSSAN) and/or California High Speed Rail Authority projects. NCTD states:

Currently, no additional future double-track projects have been identified by NCTD to be constructed within the Camp Pendleton area. It should be noted, however, that NCTD performs railroad maintenance-of-way activities on a continuous basis, is required to respond promptly to emergency situations as they may occur along the railroad right-of-way, and is mindful of pursuing potential opportunities that may improve railroad operations. As such, it is possible that double-tracking projects may arise in the future as individual projects or as part of comprehensive transportation improvement programs, such as LOSSAN and/or the California High Speed Rail Authority.

On the second request for individual and cumulative benefits, NCTD has provided the detailed discussion . . . which establish that the project will benefit public access. This discussion, combined with the programmatic operational discussion contained in the Fish and Wildlife Service's Biological Opinion . . . make it clear that the numbers and speeds of trains are going to increase, if not individually from this project, then certainly cumulatively based on currently planned improvements, leading the Commission to conclude that the project is likely to increase capacity. If it increases capacity, it does not qualify as an allowable use under Section 30233(a) as an incidental public service, and none of the other eight allowable uses in Section 30233 apply. Therefore, as discussed in the previous section of this report (Section B, and with elaboration in Section F), the only way the Commission could find the project consistent with the Coastal Act would be through the "conflict resolution" provision (Section 30007.5).

As a result, while the Commission concurred with CC-004-05, it found that the project was not an allowable use under Section 30233(a). However, the Commission found that the impacts on public access, water and air quality, and energy conservation from not constructing the project would be more significant and adverse than the project's wetland habitat impacts (as mitigated). Using the "conflict resolution" provision of Section 30007.5 of the Coastal Act, the Commission concluded that concurrence with the consistency certification would, on balance, be most protective of coastal resources.

The Commission is faced with a similar "allowable use" challenge in the subject consistency certification which provides for construction of the fourth double-track project in the San Onofre – Oceanside rail corridor. The Commission staff requested information from NCTD and Amtrak about the status of the three previous double-track projects concurred with by the Commission and potential future double tracking projects that both agencies might be considering. Amtrak responded that two of the projects are completed (San Onofre-Pulgas (CC-086-03) and O'Neil-Flores (CC-004-05)) but that the third (Santa Margarita (CC-052-05)) is still undergoing final engineering design. Amtrak also stated that the final two double tracking projects (San Mateo Creek and San Luis Rey River) included in the U.S. Fish and Wildlife Service's 2005 *Programmatic Biological Opinion for the Rail Corridor from the Orange County Border to Southern Oceanside for Operations and Maintenance, and Six Double Track Projects in San Diego County, California (1-6-05-P-4123.2)* have not been designed, funded, nor analyzed for detailed environmental impacts. Amtrak stated that it does not know when those two projects (or additional double track railroad projects between San Clemente and San Diego) will be constructed or when the Commission could expect to review other future double-track projects in the region.

However, the 2005 *Programmatic Biological Opinion* does include a brief summary of planning activity for double tracking the entire Los Angeles to San Diego rail corridor:

Double-track construction between the Orange County border and just north of the Buena Vista Lagoon in south Oceanside is part of a larger strategic planning effort for the second most heavily traveled intercity passenger rail corridor in the country and the only existing

rail link between the cities of Los Angeles and San Diego (LOSSAN). The purpose of double-track construction in the LOSSAN corridor is to help meet the projected increase in travel demand for the year 2025 between the cities of Los Angeles and San Diego, to substantially reduce the travel time and increase reliability, and to increase the safety and accessibility of passenger rail service throughout the LOSSAN corridor (FRA and Caltrans 2004).

In addition, Amtrak reported in the May 2007 issue of *Planning* (the Journal of the American Planning Association) that ridership on the Pacific Surfliner rail service linking San Diego, Los Angeles, and San Luis Obispo has increased by 56% since 2000.

The Commission previously determined in CC-004-05 that the programmatic railroad operational discussion contained in the U.S. Fish and Wildlife Service's 2005 *Programmatic Biological Opinion* made it clear that the numbers and speeds of trains in the corridor are going to increase over time (if not individually from the CC-004-05 project then certainly cumulatively based on planned trackway improvements) and that the CC-004-05 project would likely increase capacity in the LOSSAN corridor. Given that finding for the third double-tracking project in the corridor reviewed by the Commission, and given that the proposed project will add an additional 1.2 miles of double-tracking in the corridor, the Commission therefore reaches the same conclusion in this, the fourth, double-tracking project. The proposed Oceanside passing track extension will, cumulatively, serve to increase the capacity of the LOSSAN corridor.

As explained previously in this report, if a transportation project increases capacity, it does not qualify as an allowable use under Section 30233(a) as an incidental public service, and none of the other seven allowable uses in Section 30233 apply. Therefore, the proposed project is not an allowable use under Section 30233(a) and, as discussed below in Section III.G of this report, the only way the Commission could find this project consistent with the Coastal Act would be through the "conflict resolution" provision of Section 30007.5.

2. Alternatives. The objective of the proposed project is to extend the existing passing track, located to the west of the main line track, southward for an additional 1.2 miles to improve operational efficiencies for passenger and freight railroad operations in the LOSSAN corridor. The proposed project is located wholly within the NCTD right-of-way, which provides adequate room for the track extension, and the right-of-way is located within a highly developed urban area. Except for wetlands at the Loma Alta Creek crossing, the proposed project would not pass through or near environmentally sensitive habitat. As a result, NCTD states that alternative passing track design layouts at the Oceanside project site (e.g., constructing an alternative main line route, placing the passing track on the east side of the main line) are not feasible due to prohibitive costs, engineering constraints, and environmental impacts, and that the no-project alternative would not meet the project objective. However, construction of the proposed project does not commit the Commission to approve additional sections of double-track in the coastal zone portion of the LOSSAN corridor, particularly where such construction may generate significant adverse impacts on coastal resources and where less environmentally damaging alternatives may be feasible. The proposed Oceanside passing track extension, and the three sections of double-track on Camp Pendleton Marine Corps Base previously approved by the

Commission under consistency certifications from NCTD, are designed to accommodate permanent double-track railroad operations and will not require structural modifications that would likely generate additional impacts to coastal resources, in particular wetland and other environmentally sensitive habitats. As discussed in the following section, NCTD has designed the Oceanside passing track project to avoid, minimize, and mitigate impacts to wetland habitat. Therefore, the Commission agrees with the NCTD that the proposed project represents the least environmentally damaging alternative and is consistent with the alternatives test of Section 30233(a).

3. Mitigation. NCTD submitted a *Draft On-Site Wetland Restoration and Monitoring Plan* for the proposed project as a part of the consistency certification. The *Plan* describes the proposed mitigation measures for impacts to waters and wetlands resulting from construction of the two bridges over Loma Alta Creek, located approximately 700 feet inland of the Pacific Ocean. The *Plan* includes the following elements:

- Project Description
- Existing Conditions
- Restoration Methodology
- Monitoring and Maintenance
- Contingency Measures
- Biological Resources Assessment Results

The *Plan* states that:

Construction of the proposed double track project and implementation of wetland restoration will be contained within the NCTD right of way which extends a maximum of 100 feet on either side of the existing track structure. This area is also referred to as the Area of Potential Effect (APE). The restoration area includes several habitat types including brackish water wetland, open water, disturbed/ruderal wetland areas, and developed land. In general, the restoration area includes all existing brackish water wetland areas and disturbed sites with a high groundwater table. This area extends up to 500 feet northwest and southeast from Loma Alta Creek. Appendix A provides photographs of the restoration site at Loma Alta Creek. Within this area, 0.31 acres are proposed for mitigation.

... the area north of Loma Alta Creek is heavily disturbed and is surrounded by the La Salina Wastewater Treatment Plant and a commercial facility. Several areas adjacent to the existing wetland habitat have been modified by importation of fill and vehicle traffic. Exotic plant species are prevalent in the marsh area adjacent to the creek. The area north of the creek and west of the existing track has been filled for creation of a road. Likewise, the wetland area on the southwest side of the existing track has been disturbed by vehicle traffic and colonization of exotic plant species. The southwest side of the creek is bordered by a concrete walkway and Buccaneer park and includes several landscape trees and shrubs. On the southeast side of the creek, a small ditch lies between the railroad embankment to the west and La Salina Trailer Park to the east.

The *Plan* next describes the following vegetation communities present within the restoration area:

Open Water. *Loma Alta Creek provides relatively deep brackish water habitat. Upstream inflows are freshwater while the downstream end receives tidal influence through groundwater and possible overwash during high surf or high tide conditions. Special status species, including the tidewater goby, are not known to occur in Loma Alta Creek (USFWS 2005).*

Brackish/Freshwater Marsh. *On either side of Loma Alta Creek, the terrain drops abruptly to a low-lying area along the creek. This section includes areas of brackish or freshwater marsh vegetation. Within a few hundred feet of Loma Alta Creek the presence of a high groundwater table has created brackish and freshwater marsh habitat. The incidence of exotic plant species is high, but some areas of native saltmarsh are present. Dominant species are pickleweed (*Salicornia virginica*), saltgrass (*Distichlis spicata*), spearscale (*Atriplex triangularis*), jaumea (*Jaumea carnosa*), fivehorn smotherweed (*Bassia hyssopifolia*), and other wetland species dominate the vegetation in this area. The perimeter of this area is disturbed by vehicle and foot traffic, and many areas are dominated by exotic plant species. The exotic Bermuda grass (*Cynodon dactylon*) is present in occasional patches. Larger areas, especially along the creek, are being invaded by the exotic African Bermuda grass (*Cynodon transvalensis*). Areas that are greater than 90 percent dominated by exotic species are included in the following resource categories, Disturbed Wetland Areas and Ruderal Areas.*

Disturbed Wetland Areas. *Areas mapped as ruderal/disturbed wetland are generally present on the margins of existing marsh habitat. Disturbance by vehicle traffic, importation of fill or domination by exotic species is characteristic of these sites. These areas generally have shallow groundwater, and would be capable of supporting marsh vegetation in the absence of disturbance factors. The area to the southwest of the existing railroad is heavily dominated by the exotic fivehorn smotherweed. The area located in the northwest portion of the site is a historical access road and has been modified by importation of fill material. Along the eastern and western shore of Loma Alta Creek the exotic Bermuda grass (*Cynodon dactylon*) and African Bermuda grass (*Cynodon transvalensis*) are dominant. Mitigation is proposed for these locations.*

Ruderal Areas. *Areas mapped as ruderal are dominated by exotic species. These areas are generally directly adjacent to developed areas, but are colonized by exotic or other naturalized species. Much of the undeveloped area to the west of the track had very short herbaceous vegetation on December 5, 2002, including Australian saltbush (*Atriplex semibaccata*), Russian thistle (*Salsola tragus*), and several non-native annual grasses: Italian ryegrass (*Lolium multiflorum*), ripgut brome (*Bromus diandrus*), and red brome (*Bromus madritensis* ssp. *rubens*). Patches of taller herbaceous vegetation included the previous species, as well as bristly ox tongue (*Picris echioides*), wild radish (*Raphanus sativus*), wavyleaf sealavender (*Limonium sinuatum*), and Menzies' goldenbush (*Isocoma menziesii*). Vegetation along the railroad embankment north of Loma Alta Creek included*

myoporum (Myoporum laetum), a patch of prickly-pear and one of cholla (Opuntia spp.), tree tobacco (Nicotiana glauca), and young palms. On June 3 and 4, 2003, an additional species, cretanweed (Hedynois cretica), was observed in much of the upland area south of Loma Alta Creek. Two palm trees are located at the western edge of the site, at the base of the La Salina Wastewater Treatment Plant. During the October 26 and 27, 2006, site visit, the vegetation remained unchanged from that described above.

Developed Land. *Developed Land is dominated by buildings, roads, railroad or other urban and suburban development. These areas are colonized by exotic vegetation or planted with horticultural varieties. Buccaneer Park, southwest of Loma Alta Creek, is landscaped with trees and a lawn. The immediate vicinity bordering the existing track is kept primarily unvegetated.*

The *Plan* reports that Loma Alta Creek is channelized and is currently bordered on each side by rock riprap. The creek is tidally influenced and water level changes (approximately four inches) have been observed on-site, even when the mouth of the creek was closed by a sandbar. The creek is bordered by a narrow, low-lying bench with a maximum width of 380 feet, and the bench in turn is bordered by the existing railroad embankment, which rises abruptly to 20 feet above the elevation of the creek. A delineation of wetlands and other waters at the project site was performed on site by NCTD's biological consultant (ENTRIX) in December 2002 and June 2003, and was reconfirmed and refined on-site in October 2006. Coastal Act wetlands were delineated and mapped based on the presence of one of the following wetland attributes: wetland hydrology, hydric vegetation, or hydric soils. Approximately 1.2 acres of Coastal Act wetlands were determined to be located within the project area (100 feet on either side of the existing main line track) and are found only adjacent to Loma Alta Creek. The proposed project will result in the permanent loss of 0.1 acres of Coastal Act wetlands (representing 8.3 percent of the existing acreage at the site) and will temporarily affect 0.06 acres of Coastal Act wetlands (representing 5.0 percent of existing acreage).

The *Plan* states that the primary restoration goal is to restore 0.3 acres of brackish/freshwater marsh habitat in marginal/ruderal areas adjacent to healthy marsh habitat bordering Loma Alta Creek in order to compensate for the loss of 0.1 acres of wetlands from project construction. The *Plan* will also comply with the mitigation measures previously prescribed for the project in the 2005 USFWS *Programmatic Biological Opinion*. The *Plan* includes the establishment and maintenance of erosion control measures during construction, site remediation (i.e., appropriate grading and soil preparation), eradication of exotic species, revegetation with native plant species from local stock acclimated to the coastal environment, and maintenance and monitoring of mitigation areas. The desired vegetation pallet for the mitigation areas will include native plant species present in the area, primarily pickleweed, saltgrass, and jaumea. The main source of water for the restored wetlands will be tidally-influenced groundwater, with less significant inputs from overbank flows during heavy precipitation events and from high surf and tidal flows into the lagoon and lower creek.

Three mitigation areas are identified in the *Plan*:

Area A. 2,300 sq.ft. site (0.053 acres) located in the northeast corner of the restoration area. Currently unvegetated or very sparsely vegetated, composed of compacted fill for an access road, with a shallow groundwater table. Fill material will be removed and an appropriate final grade elevation will be established to ensure contact with groundwater. Vehicle traffic will be excluded and the site planted with native species.

Area B. 4,500 sq.ft. site (0.103 acres) located in the southeast corner of the restoration area. Vegetative cover is 100 percent but is dominated by exotic Bermuda grass and African Bermuda grass. Restoration will require eradication of exotic species with some planting of native species.

Area C. 9,540 sq.ft. site (0.219 acres) located on the western side of the restoration area. Mostly unvegetated due to its former use as an access road. Patchy pickleweed cover is found at the southeast corner and restoration here will focus on vehicle exclusion and planting of native species. The northwest corner of Area C is composed of fill soil and exotic vegetation. Restoration will involve removal of fill material, establishment of an appropriate final grade to ensure contact with groundwater, eradication of exotics, and revegetation with native species.

The *Plan* next describes the methodology by which the restoration areas will be restored, including information on grading, site preparation, erosion control, exotic species eradication, plant installation (e.g., hydroseeding, direct transplant of native on-site plants, container stock,), and irrigation. In brief:

- Grading in restoration areas will match the current elevation of adjacent wetland areas in order to create similar groundwater conditions and enable contact with overbank flows.
- Restoration areas will be ripped or scarified to a depth of six to twelve inches to reduce soil compaction and to create horizontal rills on the soil surface.
- Graded slopes will be stabilized with biodegradable erosion control fabric and other measures as required by the Storm Water Pollution Prevention Plan.
- A cycle of “grow and kill” will be used to remove non-native seed banks, and exotic species will be eradicated through a combination of mechanical and, only when necessary and at minimum levels, chemical methods.
- Revegetation plantings will be native California species grown from stock located in southern California and acclimated to the coastal environment. Hydroseeding will use a coastal sage scrub mixture. Where possible, all native plants displaced by project construction will be excavated and retained for transplanting.
- The need for supplemental irrigation is not expected at the restoration areas. Revegetation is scheduled to occur between October and February to take advantage of

winter precipitation. If supplemental irrigation is needed, it would likely be supplied by a water truck.

The *Plan* next describes the monitoring and maintenance elements of the restoration project:

NCTD will provide for a contractor to conduct monitoring and maintenance related to site revegetation and eradication of exotic species. The proposed monitoring and maintenance schedule will continue until final success criteria are achieved. The goal of monitoring is to establish data to support adaptive management of the restoration site, while providing regulatory agencies with information to determine if the project is in compliance with selection criteria. If any performance standards or final success criteria are not achieved, the permitting agencies could require the permittee to undertake remedial actions to ensure mitigation success, which could prolong the maintenance and monitoring period. Monitoring and maintenance will be performed monthly during plant establishment, on a quarterly basis during the first year, and at least twice per year thereafter for the 5-year monitoring period.

The *Plan* includes details on: (1) performance criteria for wetland soils and hydrology and plant cover, species diversity, and species composition; (2) monitoring methods, including schedules, qualitative monitoring, photo documentation, quantitative monitoring, and quadrat sampling; (3) maintenance actions; (4) annual monitoring reporting; and (5) potential remediation actions should restoration fall short of performance criteria, including planting density augmentation and supplemental irrigation. NCTD will provide the *Final On-Site Wetland Restoration and Monitoring Plan* to the Executive Director for review and concurrence prior to the start of project construction, and will also provide copies of the annual monitoring reports to the Executive Director.

4. Conclusion. The Commission finds that the proposed Oceanside passing track extension project is consistent with the wetland fill alternatives and mitigation tests, but is not consistent with the allowable use test, of Section 30233(a) of the Coastal Act for the reasons described above. Therefore, the only way the Commission could concur with this consistency certification would be if it finds the project consistent with the Coastal Act through the “conflict resolution” provision contained in Section 30007.5. As discussed in Sections III.B, III.C, and III.D of this report, not approving the project would be inconsistent with the water quality, public access, and air quality/energy consumption policies of the Coastal Act, because it would eliminate the project benefits to coastal resources from improving existing and future public access, reducing vehicle miles traveled, and improving air and water quality by reducing traffic congestion. Thus, the project creates a conflict between the allowable use test of the wetlands policy of the Coastal Act (Section 30233(a)) on the one hand, and the water quality, public access, and energy conservation policies of the Coastal Act (Sections 30231, 30232, 30210, 30212, 30252, and 30253) on the other. In the concluding section of this report (Section G) the Commission will resolve these conflicts and determine that concurrence with this consistency certification would, on balance, be most protective of significant coastal resources.

B. Water Quality. The Coastal Act provides the following:

Section 30231. The biological productivity of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30232. Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

The San Diego Regional Water Quality Control Board has placed Loma Alta Creek and Slough on its list of Section 303(d) impaired water bodies, due the presence of bacteria and nutrients/eutrophication. NCTD has included commitments for water quality protection in its consistency certification, stating that it will develop and implement a Storm Water Pollution Prevention Plan (SWPPP, with monitoring and maintenance schedules) and will obtain a Clean Water Act Section 401 water quality certification from the San Diego Regional Water Quality Control Board. The NCTD will submit the SWPPP to the Commission's Executive Director for his review and concurrence prior to commencement of construction. The NCTD further states that the project includes, but is not limited to, the following best management practices for water quality protection:

Erosion Control. During construction activities, water pollution and erosion control measures will be implemented to minimize runoff and sediment from entering Loma Alta Creek. All construction near or in Loma Alta Creek will be done during the dry season to minimize the mobilization of sediment. The following measures will also be applied:

- Silt protection (fencing or other approved methods) will be in place and functional where necessary, prior to excavation of bed material and addition of fill material.*
- After bridge construction is completed, temporary fill will be removed and pre-construction contours will be restored where not altered by the permanent structure.*

Storage and Equipment Maintenance. The location of the staging area and access routes to the channels will be on pre-existing roadways and the NCTD rights-of-way (ROW). Storage and maintenance of equipment will be confined to the upland staging locations in the NCTD ROW, away from any jurisdictional waters or undisturbed habitat. Equipment or vehicles operated adjacent to the stream will be checked and maintained daily to prevent leaks of oil,

fuel or other material that, if introduced into the water, could be deleterious to aquatic life. When working within or near wetlands, the contractor will have an emergency spill containment kit to contain and remove spilled fuels, hydraulic fluids, etc. Likewise, equipment re-fueling or storage of these materials will not occur within 500 feet of wetlands and will be in accordance with approved BMPs.

Spill Control Measures. To mitigate potential impacts from spills of oils, lubricants, or other construction related hazardous materials, a project specific spill contingency plan for clean up of accidental spills will be developed and implemented.

Dust Control Measures. To reduce fugitive dust emissions during construction activities, a project specific dust control plan will be developed and implemented.

Erosion controls will also include post-construction revegetation efforts:

Ground surfaces will be regraded to pre-construction contours, except where the Project configuration requires permanent grade changes. Disturbed areas will be revegetated and/or hydroseeded with native plant species using seed and stock collected within a five-mile radius of the work area to the extent practicable. Seed sources outside the five-mile radius will be approved by the U.S. Fish and Wildlife Service to determine whether the source is acceptable.

In previous reviews of NCTD passing track projects, the Commission also concurred with NCTD's determination that:

Passenger rail vehicles are much cleaner than highway vehicles with respect to oil and grease drips. This is partially attributed to the fact that any drips from rail vehicles fall into a ballasted ROW, where gravel and soil act as a filter to prevent runoff from moving contaminants and because rail transportation involves less oil, grease, and other hydrocarbons than automobiles. On the other hand, automobiles are a significant source of hydrocarbons, which are then flushed by runoff from the Interstate 5 area into nearby water bodies. The proposed project will provide improved public transportation service and freight service, which will help reduce automobile congestion and reduce automobile vehicle miles traveled and the corresponding non-point source emissions.

As described in Section III.A of this report, the proposed project includes measures to protect wetland habitat. With those measures, and the aforementioned best management practices, the Commission finds that the proposed project will not cause significant water quality impacts at and adjacent to the project area and is consistent with the water quality protection policies of the CCMP (Coastal Act Sections 30231 and 30232).

C. Public Access and Recreation. Section 30210 of the Coastal Act provides:

Section 30210. In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational

opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30212 provides that access should not be provided where it would be inconsistent with public safety, military security needs, or the protection of fragile coastal resources. Section 30252 encourages public transit and identifies reducing traffic congestion as a coastal access benefit, providing, in part, that:

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service . . .

Concerning access issues, NCTD maintains that the project will not interfere with existing public access to coastal areas and recreational opportunities. NCTD points out that the existing railroad right-of-way is not open to general access (beyond train travel itself) and is controlled due to public safety requirements. NCTD asserts that the project conforms with the public access objectives of the Coastal Act both because it would not alter access to any existing public coastal accessways, and because it would benefit public coastal access and reduce traffic congestion by providing improved public transportation rail services (i.e., Coaster, Metrolink, Pacific Surfliner) as an alternative to individual vehicles. NCTD also points out that: (1) any freight train service improvements would also contribute to relieving congestion on I-5; (2) construction and staging activities would be located outside publicly accessible areas and thus avoid affects to existing access; and (3) the project will contribute to reduced energy consumption and vehicle miles traveled by providing a more efficient alternative to personal automobile travel, consistent both with Section 30252 as well as another Coastal Act goal expressed in Section 30253 (related to air quality).

In reviewing a previous NCTD proposal for the Oceanside-Escondido Rail Project (CC-029-02), which was proposed from inland areas to the shoreline and was a conversion of a freight rail corridor to a public transit passenger rail system connecting Oceanside, Vista, San Marcos, Escondido, and unincorporated areas of San Diego County, the Commission noted that: (a) traffic congestion adversely affects public access to the shoreline; (b) Section 30252 of the Coastal Act identifies the connection between public transit and public access to the shoreline; (c) although that project was partly parallel and partly perpendicular to the shoreline, because its service area included coastal destinations (including public beaches and a recreational boating harbor in Oceanside), it would provide an alternative means to get to the ocean; (d) it would reduce auto-related air emissions, thereby contributing to the improvement of regional air quality; (e) as part of a regional public transportation system, including bus service, light-rail and commuter trains, and trolleys, the project would increase acceptance of public transit as a desirable mode of transportation; and (f) as its acceptance and use increases, public agencies may be motivated to further improve the public transit system and these improvements will result in corresponding reductions in traffic congestion. The Commission concluded in CC-029-02 that:

. . . the proposed project will improve public access to the shoreline by reducing traffic on roads that also provide for shoreline access and by encouraging mass transit as an

alternative means to get to the shoreline. Therefore, the Commission finds that the proposed project is consistent with Sections 30210 and 30252 of the Coastal Act, and thus it is consistent with the access policies of the CCMP.

Thus, in reviewing several past actions involving public transit improvements in San Diego County, including the previous NCTD double tracking projects to the north (CC-086-03, CC-004-05, and CC-052-05), the Commission has recognized that: (1) traffic congestion constitutes a constraint on public recreation and access to the shoreline; (2) increased traffic on highways such as I-5, which is a major coastal access thoroughfare, reduces the ability of the public to attain access to coastal recreation areas and makes it more difficult for the public to get to the beach; and (3) improvements to public transit benefit public access, as discussed in Section 30252.

In the subject consistency certification for the Oceanside passing track extension, NCTD has addressed potential temporary access issues raised by construction activities, as well as the project's potential long-term benefits to public access through improvements to public transit. The consistency certification states that:

The project is located approximately 0.5 miles from the beach. Several major roadways provide access to the beach in and around the project vicinity including Oceanside Boulevard, Whaley Street, Cassidy Street, and Wisconsin Avenue. The project involves modifying the existing at-grade track crossings at Oceanside Boulevard and Cassidy Street. A traffic detour plan will be developed in order to provide safe and continuous traffic flow. All legal vehicular traffic and legal pedestrian walkways in the project area will be maintained during construction using barricades, warning signs and warning lights as required. Also, as construction and staging areas will be limited to the NCTD right-of-way (ROW), no other portions of the proposed project will limit access to the beach.

The consistency certification also states that project construction noise will cause temporary disturbances to users of Buccaneer Park (located on NCTD land west of the railroad track and south of Loma Alta Creek), and that the foot of the passing track embankment will encroach approximately 20 feet onto the eastern boundary of the park. However, the park will remain open throughout the approximate 18-month construction period and NCTD will install and maintain a demolition protection barrier to keep the existing railroad underpass walkway (located on the south bank of Loma Alta Creek) open during the construction period. The project will not create any long-term, significant adverse effects on the users of Buccaneer Park.

NCTD further states in the project *Environmental Report* that the project is a coordinated effort involving several transportation agencies:

These agencies include Amtrak, Caltrans and the North County Transit District (NCTD). Amtrak is leading the effort as directed by NCTD the owner of the corridor or right of way for the Project with funding provided by Caltrans. The Project is to extend the existing passing track at Oceanside by 1.2 miles toward San Diego. The purpose of the Project is to

provide operational flexibility to increase service reliability and enhance on-time performance.

At present there are 60 miles of main line track between San Diego and Orange County and only 19 of the 60 miles are double tracked. This corridor presently serves 51 daily trains operated by Amtrak, NCTD, Metrolink and BNSF railroad. Already, train delays are common and with the projected increase in the number of trains and ridership, the proposed extension of the Oceanside passing track is expected to minimize further deterioration in service reliability.

The completion of this project will help to resolve current operational delays and enhance the capacity and utility of the Los Angeles-San Diego (LOSSAN) Corridor. Specifically, more track capacity is needed in a congested segment of the railroad line. Rail passenger service between San Diego, Oceanside, Fullerton and Los Angeles share this track with the west end of the Burlington Northern Santa Fe (BNSF) transcontinental main line. The Coaster, Pacific Surfliner, as well as freight service on this line from Oceanside to San Diego, will benefit by the operational advantages presented by the construction of a 1.2 mile section of double track from MP 227.2 to MP 228.4 and the addition of a new 240 foot bridge over Loma Alta Creek (MP 227.6).

The Commission finds that the proposed project would, both individually and cumulatively, provide public access and recreation benefits, by reducing highway traffic congestion along the coast and improving public transit services within the coastal zone. The Commission therefore finds that the proposed project is consistent with the public access and recreation policies of the CCMP (Coastal Act Sections 30210-12 and 30252).

D. Air Quality and Energy Consumption. Section 30253(4) provides that new development shall “minimize energy consumption and vehicle miles traveled.” In reviewing NCTD’s proposal for Oceanside-Escondido Rail Project (CC-029-02), the Commission noted that the public transit project: (a) would reduce auto-related air emissions, thereby contributing to the improvement of regional air quality; (b) as part of a regional public transportation system, including bus service, light-rail and commuter trains, and trolleys, the project would increase acceptance of public transit as a desirable mode of transportation; and (c) as its acceptance and use increases, public agencies may be motivated to further improve the public transit system and these improvements will result in corresponding reductions in traffic congestion. The Commission noted:

The air quality benefits [cited in that project’s EIR] are partially offset by increased pollution caused by the train’s use of diesel fuel. However, as described in the Access Section above, the proposed project will probably have significant VMT reductions as the regional mass transit program expands and as public transit becomes a more accepted mode of transportation. As the percentage of traffic accommodated by mass transit grows, there will be a corresponding reduction in air pollution from automobiles. However, there will not be a corresponding increase in air pollution as ridership of the rail system grows. As ridership grows there will be more reductions in air quality impacts from automobiles.

In conclusion, the Commission finds that the proposed project will reduce energy consumption and improve air quality.... Therefore, the Commission finds that the project is consistent with Section 30253 of the Coastal Act, and thus with the energy consumption and air quality policies of the CCMP.

For the subject project, NCTD states that the project's air quality benefits include reduced idling time by automobiles on highways and train locomotives in the LOSSAN corridor and will lead to reduced emissions of pollutants. The Commission finds that the proposed project will help to reduce energy consumption and improve air quality and is therefore consistent with the air quality policy of the CCMP (Coastal Act Section 30253(4)).

E. Public Views. Section 30251 of the Coastal Act provides:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

The project *Environmental Report* states that:

As the project will be at grade with the existing rail track, views to and along the ocean will not be affected by the project. Restoration of the Loma Alta Creek area . . . will return this area to pre-construction conditions where possible, causing minimal impact to natural landforms and aesthetic qualities in the area. The only change to the visual character of the area will be the replacement of the wood trestle bridge with two concrete bridges. The bridge replacement will not significantly change the scenic or visual quality of the area.

The project includes the replacement of the existing wooden trestle supporting the main line railroad track with a precast concrete bridge and the construction of a similar bridge to support the passing track. The design of the proposed bridges is consistent with other NCTD and Amtrak railroad bridge replacement projects previously reviewed by the Commission at locations in San Diego County. In addition, South Pacific Street crosses Loma Alta Creek on a concrete highway bridge just downstream of the project site at the shoreline. While the new railroad bridges and embankments will be visible from Buccaneer Park, located immediately south of Loma Alta Creek between the railroad tracks and South Pacific Highway, the bridges and embankments are located on the inland side of the park and will not intrude into public views towards the shoreline from the park. The Commission agrees that the proposed passing track extension and replacement mainline bridge will not adversely affect public views to or along the ocean or scenic coastal areas. The Commission therefore finds that the proposed project is consistent with the public view policy of the CCMP (Coastal Act Section 30251).

F. Cultural Resources. Section 30244 of the Coastal Act provides that "Where development would adversely impact archaeological or paleontological resources as identified by the State

Historic Preservation Officer, reasonable mitigation measures shall be required.” The project *Environmental Report* states that:

The staff at the South Coastal Information Center in San Diego, California conducted a record search of the project area on January 21, 2003. The record search encompassed the proposed project area and a ¼ mile radius around the proposed project area. The results of the record search indicated that there is an archaeological resource (CA-SDI-13212) with two components (one historic and one prehistoric) within the proposed project area and one prehistoric resource (CA-SDI-14059) within ¼ mile of the proposed project area.

The historic component of Site CA-SDI-13212 is located within the project area on the eastern side of the main line and is comprised of historic debris (e.g., bottle glass, ceramic fragments, metal objects, brick fragments) dating back to the 1920s. A field survey conducted in March 2003 by the NCTD archaeologist documented no previously undiscovered cultural resources in the project area. The *Environmental Report* concludes that:

Although no cultural resources were observed during the survey of the parcel, there is always a possibility that such resources may become visible once vegetation is removed or during construction excavation . . . Should any previously undiscovered historic or prehistoric resources be found during construction, work should stop until such time that the resource can be evaluated by a qualified archaeologist and appropriate mitigative action taken as determined necessary by a qualified archaeologist.

The Commission finds that the proposed passing track extension will not adversely affect cultural resources known to exist in the project area, and that work will stop and mitigation measures implemented should any cultural resources be discovered during project construction. Therefore, the Commission determines that the proposed project is consistent with the cultural resource policy of the CCMP (Coastal Act Section 30244).

G. Conflict Between Coastal Act Policies. Section 30007.5 of the Coastal Act provides the Commission with the ability to resolve conflicts between Coastal Act policies:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

1) Conflict. In order for the Commission to consider balancing Coastal Act policies, it must first establish that there is a conflict between these policies. The fact that a project is consistent with one policy of the Coastal Act and inconsistent with another policy does not necessarily result in a conflict. Rather, the Commission must find that to object to the project based on the policy inconsistency would result in coastal zone effects that are inconsistent with the Coastal Act.

As discussed previously in Section III.A, above, because the project would increase railway capacity, it does not qualify as an incidental public service under Section 30233(a)(5), Commission interpretations of which historically only allow transportation projects in wetlands where they are necessary to maintain *existing* capacity. Therefore, because the project is not an allowable use, the only way the Commission could find the project consistent with the Coastal Act would be through the “conflict resolution” provision (Section 30007.5).

As described in the access section above (Section III.C), one of the project purposes/benefits is reduced traffic congestion on area highways. NCTD has provided evidence in previous consistency certifications that double-tracking projects provide significant public access and recreation benefits, both through reducing traffic congestion along and improving public access to the coast. NCTD has reiterated that finding in its subject consistency certification. The Commission finds that traffic congestion interferes with access to the coastal recreational opportunities within northern San Diego County (including travelers from Los Angeles and Orange Counties). As traffic congestion increases with expected growth of the region, these access impacts will worsen, and when congestion increases, non-essential trips such as those for recreational purposes tend to be among the first to be curtailed. Thus, as the traffic increases, the ability for the public to get to the coast will become more difficult, which would result in a condition that would be inconsistent with the access policies of the Coastal Act.

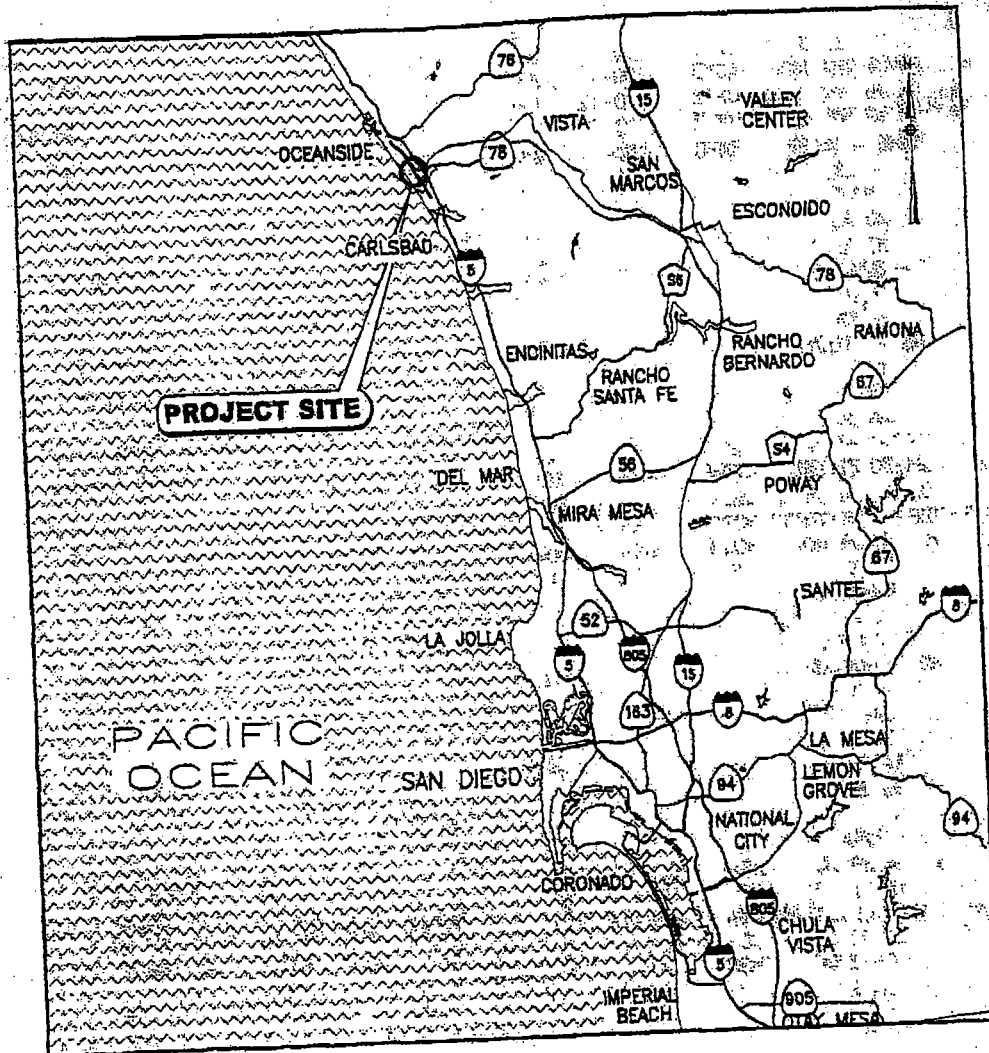
As discussed in Sections III.B and III.D above, traffic increases that would occur if this project is objected to would also degrade water quality. This would result in conditions that are inconsistent with the water and air quality policies of the Coastal Act, because they would adversely affect already impaired coastal water bodies and exacerbate non-attainment status of the coastal air basin. Section 30231 of the Coastal Act requires the maintenance and restoration of coastal water quality. Section 30253(4) provides for improved air quality and reductions in energy consumption and vehicle miles traveled. Section 30252 articulates that one of the Coastal Act’s access goals is encouraging maintenance and enhancement of public access through facilitating the provision or extension of transit service. Thus, not only would objecting to this consistency certification be inconsistent with the access policies, but it would also result in adverse effects to coastal waters and the air basin, and be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. The Commission therefore finds that the proposed project creates a conflict between allowable use test of the wetland policies (Section 30233(a)) on the one hand, and the water quality/air quality/energy conservation/reductions in vehicle miles traveled/public access and transit policies (Sections 30231/30253(4)/30252) on the other.

2) Conflict Resolution. Having established a conflict among Coastal Act policies, Section 30007.5 requires the Commission to resolve the conflict in manner that is on balance most protective of coastal resources. In this case, the proposed project will result in the fill of 0.1 acres of wetlands. The affected habitat is adjacent to the existing rail line, and adequate on-site mitigation is being provided by NCTD to compensate for the wetland loss. On the other hand, as stated above, objecting to this consistency certification would result in conditions that would be inconsistent with the access policies (Section 30210), and would result in adverse effects to

coastal waters and the coastal air basin, and would be inconsistent with the achievement of water quality, air quality, energy conservation, and reductions in vehicle miles traveled goals expressed in Sections 30231, 30253(4), and 30252. In resolving the Coastal Act conflict raised, the Commission finds that the impacts on coastal resources from not constructing the project would be more significant and adverse than the project's wetland habitat impacts, which would, as conditioned, be adequately mitigated. The Commission therefore concludes that concurring with this consistency certification would, on balance, be most protective of coastal resources.

SUBSTANTIVE FILE DOCUMENTS:

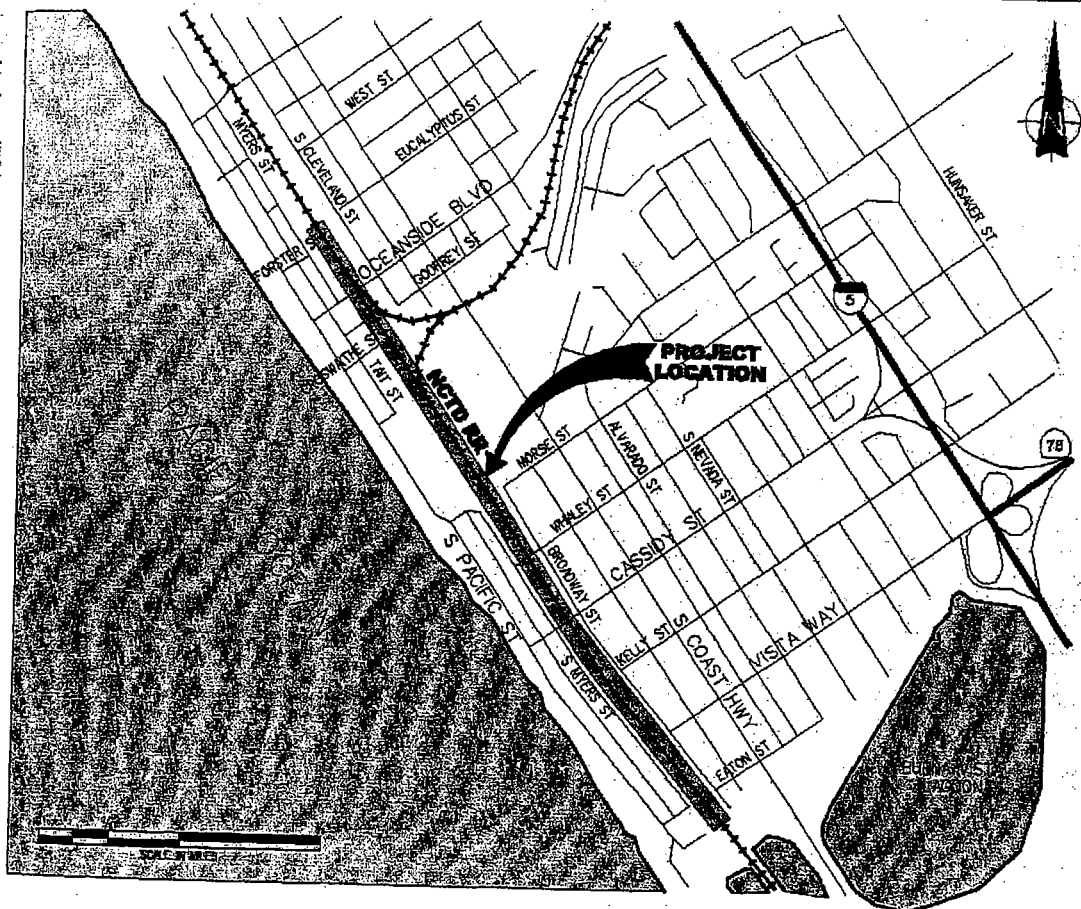
1. CC-072-05, NCTD, after-the-fact consistency certification, emergency repairs, Bridge 208.6, San Onofre Creek, Marine Corps Base Camp Pendleton.
2. CC-055-05, NCTD, Bridge replacement (single-track), Agua Hedionda Lagoon, Carlsbad.
3. CC-052-05, NCTD, Replacement of Santa Margarita River Railroad Bridge, Marine Corps Base Camp Pendleton.
4. CC-004-05, NCTD, O'Neil to Flores Second Track, Marine Corps Base Camp Pendleton.
5. CC-086-03, NCTD, Second Track San Onofre Area, Camp Pendleton Marine Corps Base.
6. CC-058-02, City of Santa Barbara, Modifications to the Santa Barbara Airport.
7. CC-029-02, NCTD, Oceanside-Escondido Rail Project.
8. Programmatic Biological Opinion for the Rail Corridor from the Orange County Border South to Southern Oceanside for Operations and Maintenance, and Six Double-Track Projects in San Diego County, California (1-6-05-P-4123.3)
9. NCTD Coastal Development Permits, 6-01-108 (NCTD - Tecolote Creek), 6-01-64 (NCTD - Balboa Avenue), 6-94-207 (NCTD - Solana Beach), 6-93-106 (NCTD - Carlsbad), and 6-93-105 (NCTD - Camp Pendleton), 6-93-60 (NCTD - Del Mar).
10. "Waiting at the Station," *Planning*, Vol. 73, No. 5, pp. 12-17, May 2007.



<p>PURPOSE: The project will help to resolve current operational delays and enhance the capacity and utility of the Los Angeles-San Diego (LOSSAN) Corridor.</p> <p>DATUM: NAD 83</p> <p>ADJACENT PROPERTY OWNERS: See List Included with Section 404 Application - Appendix F</p>	<p>Vicinity Map</p>	<p>Oceanside Double Track Project IN: Oceanside AT: Between MP 227.2 (CP Escondido Junction) and MP 228.4 (CP Lagoon) just north of Oceanside Blvd. COUNTY OF: San Diego STATE: California APPLICATION BY: North County Transit District</p>
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Figure 2-1. Vicinity Map for the Oceanside Passing Track Extension Project Site, San Diego County, California.

EXHIBIT NO. 1
APPLICATION NO.
CC-008-07



PURPOSE:

The project will help to resolve current operational delays and enhance the capacity and utility of the Los Angeles-San Diego (LOSSAN) Corridor.

DATUM: NAD 83

ADJACENT PROPERTY OWNERS:

See List Included with Section 404 Application - Appendix F

Location Map

Oceanside Double Track Project

IN: Oceanside

AT: Between MP 227.2 (CP Escondido Junction) and MP 228.4 (CP Lagoon) just north of Oceanside Blvd.

COUNTY OF: San Diego

STATE: California

APPLICATION BY: North County Transit District

Figure 2-2. Location Map for the Oceanside Passing Track Extension Project, California.

EXHIBIT NO. 2

APPLICATION NO.

CC-008-07

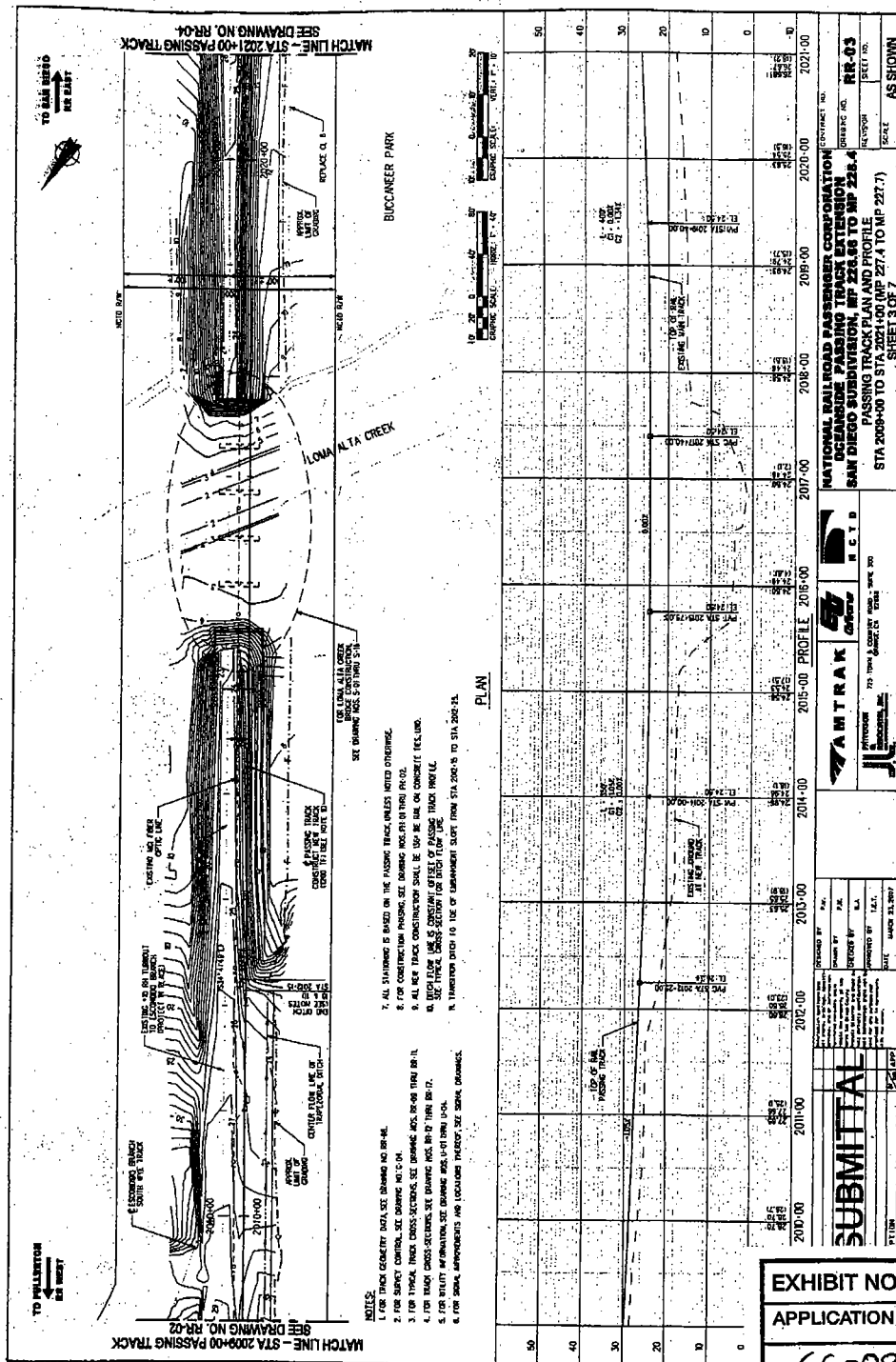


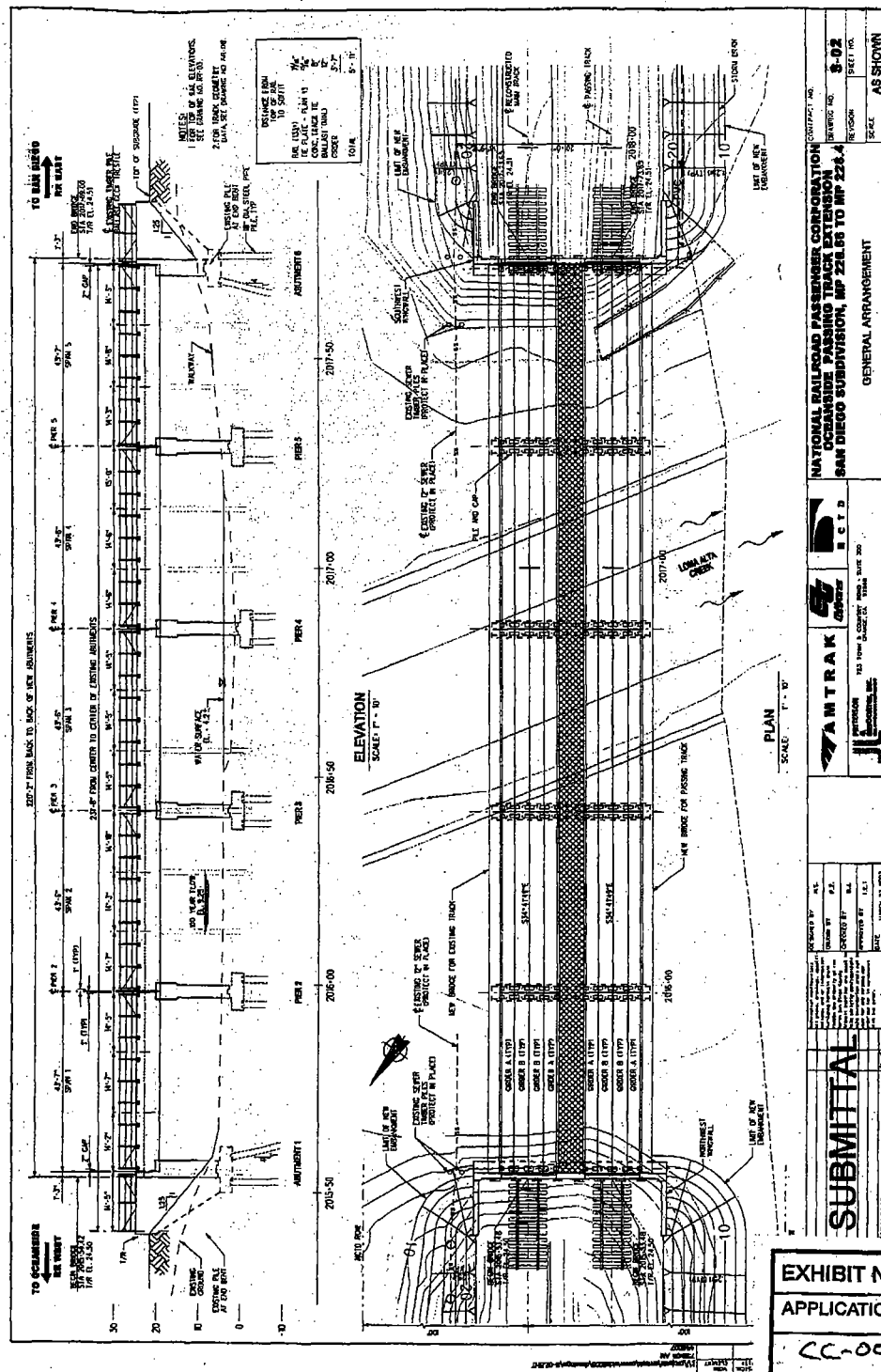
Figure 1 – Aerial view of Loma Alta Creek



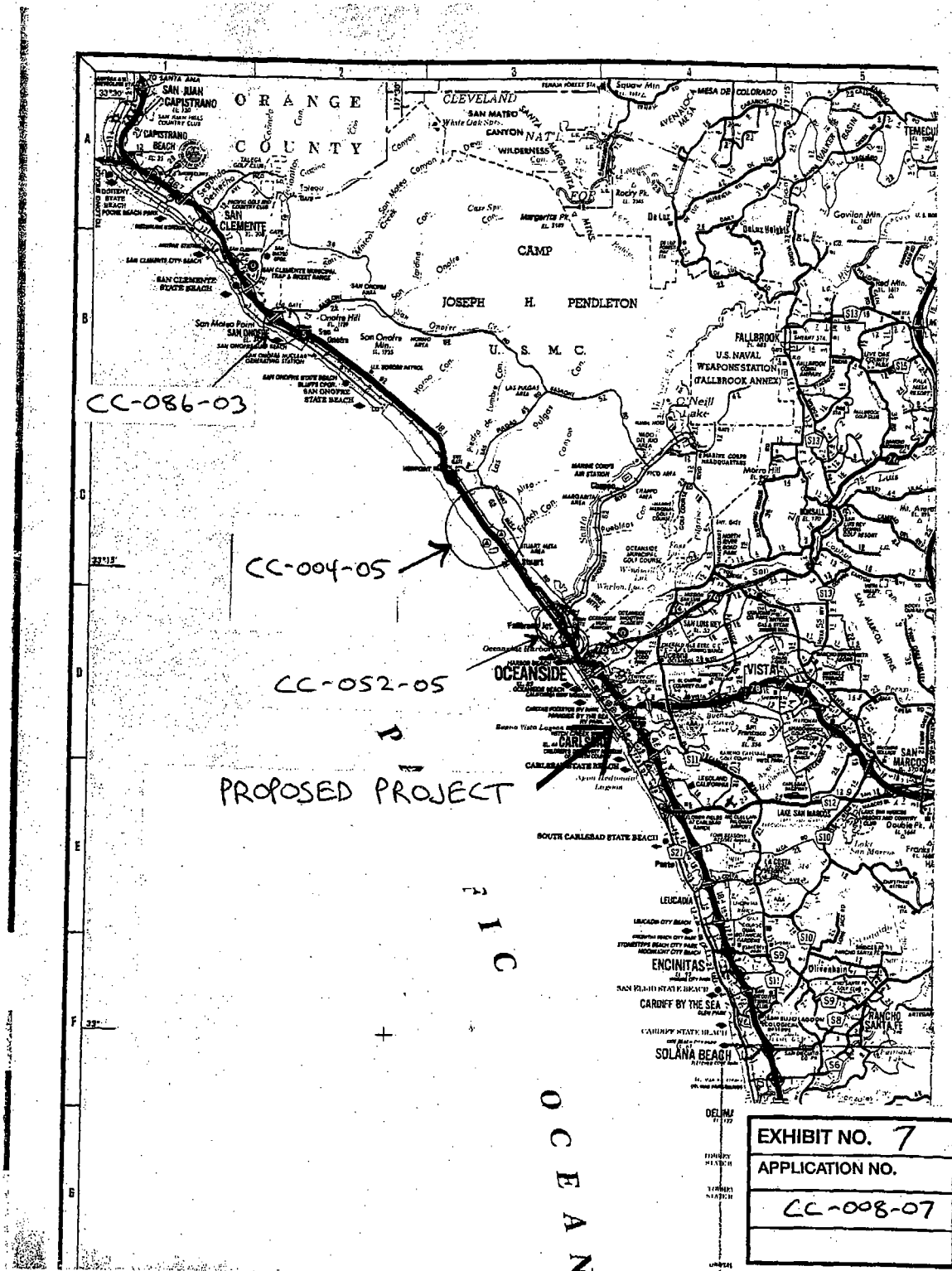
Figure 2 – Close-up of Bridge

EXHIBIT NO. 3
APPLICATION NO.
CD-008-07









Mr. Mark E. Yachmetz (FWS-SDG-4123.2)

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Within the ROW, rehabilitation/restoration will involve the removal of temporary fencing, erosion controls and debris, decompaction, as well as the implementation of a restoration plan. This plan would include planting and/or seeding, and monitoring of the appropriate native species in temporarily impacted areas.

The overall construction timeframe is estimated to be approximately two years. Common earthmoving machinery and vehicles will be used for construction, including: Bull Dozers, Backhoes, Graders, Dump Trucks, Flatbed Trucks, Cranes, Pickup Trucks, and/or SUVs.

Conservation Measures

The conservation measures listed in this section are proposed by FRA, SANDAG and NCTD to avoid and minimize adverse effects to listed species and to compensate for unavoidable adverse effects. Appendix 1 identifies the routine maintenance activities that would not affect listed species.

General Conservation Measures

GEN1 All vegetation within the project footprint will be cleared between September 15 and February 14 to avoid and minimize impacts to migratory birds and raptors. If clearing activities must occur during the migratory bird and raptor breeding season, then pre-construction surveys will be conducted to ensure that no breeding migratory birds or raptors are present within or immediately adjacent to the proposed clearing area. Should a breeding migratory bird or raptor or nest be located, then clearing will be postponed until 2 weeks after the young have fledged or the biologist determines that the nest has failed.

GEN2 SANDAG or NCTD will designate a Service approved biologist (project biologist) who will be responsible for overseeing compliance with protective measures for the biological resources during clearing and work activities within areas of native habitat and adjacent to areas known to be occupied by sensitive habitats and species. The project biologist will be familiar with the habitats, plants, and wildlife on Camp Pendleton, and maintain communications with the Resident Engineer (RE), to ensure that issues relating to biological resources are appropriately and lawfully managed. The project biologist will review final plans, designate areas that need temporary fencing, and monitor construction. The project biologist will be made available to review grading plans, address protection of sensitive biological resources, and monitor ongoing activities. The biologist will monitor activities within designated areas during critical times such as vegetation removal, the installation of Best Management Practices (BMPs) and fencing to protect native species, and ensure that all avoidance and minimization measures are properly constructed and followed. The project biologist will immediately notify the RE to halt all associated activities that may be in violation of this biological opinion. In such an event, the RE will halt all

EXHIBIT NO. 8
APPLICATION NO. CC-008-07

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such activities and contact the Service within 24 hours. The project biologist will submit weekly reports to the Service during initial grading and clearing, and when in the opinion of the biologist, work occurs near sensitive biological resources. The project biologist will provide a final report documenting compliance with avoidance and minimization measures within 60 days of the completion of work. For projects lasting more than one year, an annual report will be submitted.

GEN3 An employee education program will be developed. Each employee (including temporary contractors and subcontractors) will receive a training/awareness program prior to conducting physical activities related to the work addressed by this biological opinion. The program will advise workers of potential impacts to the sensitive habitats and species and the potential penalties for impacts to such habitat and species. At a minimum, the program will include the following topics: occurrence of the listed and sensitive species in the area, a physical description and their general ecology, sensitivity of the species to human activities, legal protection afforded these species, penalties for violations of Federal and State laws, reporting requirements, and work features designed to reduce the impacts to these species; and to the extent practicable, promote continued successful occupation of areas adjacent to the work footprint. Included in this program will be color photos of the listed species, which will be shown to the employees. Following the education program, the photos will be posted in the contractor and resident engineer's office, where they will remain through the duration of the work. The proponent of the work and the project biologist will be responsible for ensuring that employees are aware of the listed species. Photos of the habitat in which sensitive species are found will be posted on-site.

GEN4 The changing of oil, refueling, and other actions that could result in a release of a hazardous substance will be restricted to designated areas that are sited as far as is practicable from any sensitive plant populations, sensitive habitats, or drainages. Such designated areas will be surrounded with berms, sandbags, or other barriers to further prevent accidental spill of fuel, oil, or chemicals. Any accidental spills will be immediately contained, cleaned up, and properly disposed.

GEN5 During the migratory bird and raptor breeding season, storage and staging areas will be placed as far from sensitive areas as practicable. To the maximum extent practicable, staging areas will be located within previously disturbed sites and no closer than 100 feet from sensitive habitat. Prior written approval from the Service is required for staging within native habitat areas or within 100 feet during the migratory bird and raptor breeding season.

GEN6 Impacts from fugitive dust will be offset through implementation of Caltrans Standard Specifications, including Section 7-1.01F Air Pollution Control, Section 10 Dust Control, Section 17 Watering, and Section 18 Dust Palliative. The project biologist will periodically monitor the work area to ensure that work activities do not generate

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excessive amounts of dust or cause other disturbances. Erosion control measures will be regularly checked by the RE or the RE's appointed representative.

GEN7 To avoid attracting predators of migratory birds, the work site will be kept as clean of debris as possible. All food related trash items will be placed in sealed containers and regularly removed from the site.

GEN8 Pets of personnel will not be allowed on the work site.

GEN9 Night lighting in the vicinity of native habitat areas will not occur to the maximum extent practicable. Any night lighting will be selectively placed, shielded, and directed away from all areas of native habitat to the maximum extent practicable.

GEN10 Environmentally Sensitive Areas (ESAs) include areas of native vegetation and habitat for listed species. ESAs along the edge of the project footprint will be delineated by the proponent. All parties associated with the work will strictly avoid these areas. No work activities, materials, or equipment storage or access will be permitted in an ESA. The boundaries of the ESA will be fenced with orange plastic snow fencing. Work areas will be marked clearly in the field and confirmed by the project biologist prior to habitat clearing, and the marked boundaries will be maintained throughout the duration of the work.

Conservation Measures for Temporary Vegetation Impacts

TVG1 Native vegetation in the temporary impact footprint shall be trimmed at the surface rather than uprooted to the maximum extent practicable.

TVG2 All generally native areas, as opposed to generally developed areas, temporarily impacted by work activities will be re-vegetated with native plant species using a standardized restoration plan submitted to the Service at least 90 days prior to planting. The restoration plan will describe revegetating all temporarily disturbed areas within the scope of this Opinion. All native seed and plant stock will be from seed and propagules collected within a five-mile radius of the work area to the extent practicable. Seed sources outside of the five-mile radius will be approved by the Service to determine whether the source is acceptable. All seeding will occur during the first winter or fall following completion of the work.

TVG3 No invasive exotic plant species will be seeded or planted adjacent to or near sensitive vegetation communities or waters of the U.S. In compliance with Executive Order 13112, impacted areas will be reseeded with plant species native to local habitat types, and will avoid the use of species listed in Lists A & B of the California Exotic Pest Plant Council's (Cal-EPPC) List of Exotic Pest Plants of Greatest Ecological Concern in California as of October 1999 to the greatest extent practicable.

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Areas hydroseeded for temporary erosion control measures will use native plant species.

- TVG4 Temporary Impact areas will be restored in kind, except temporary impacts to disturbed habitat and non-native grassland in generally native areas will be revegetated with the most appropriate native plant palette following completion of the work. Any areas of disturbed habitat or non-native grassland revegetated with a native palette will not be counted as native habitat for any future transportation-related activity.

Conservation Measures for Permanent Vegetation Impacts

Because the public purpose of the NCTD ROW is a transportation corridor, it is recognized that NCTD cannot commit the ROW to long-term habitat preservation. Permanent impacts to vegetation associated with work within the ROW will be offset in an area outside of the ROW (off-site conservation area).

- PVG1. The following measures apply to the off-site conservation area.
- a. Coastal sage scrub, southern coastal bluff scrub, maritime succulent scrub, and native grass communities will be offset at a 2:1 ratio with any combination of off-site preservation, creation, or restoration of like habitat;
 - b. Non-native annual grasslands will be offset at a 0.5:1 ratio with any combination of off-site preservation, creation, or restoration of native habitat;
 - c. Riparian areas will be offset at a 3:1 ratio with any combination of off-site preservation, creation, or restoration of native habitat; and
 - d. All Federal waters will be offset following the requirements of the Regional Water Quality Control Board and the U.S. Army Corps of Engineers.
- PVG2. A project-specific plan, outlining the details and implementation schedule of all enhancement, restoration, and creation to offset permanent impacts to vegetation will be prepared by the proponent and submitted to the Service for review and approval at least 90 days prior to the start of each of the three specific projects addressed by the biological opinion. All enhancement, restoration, and creation activities to offset permanent vegetation impacts will commence the first fall/winter season prior to or concurrently with the start of the work. The plan should also include:
- a. A 5-year maintenance and monitoring program that will be implemented for the created, enhanced and/or restored habitats.

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- b. If a performance criterion is not met, the proponent will prepare an analysis of the cause(s) of failure and, if deemed necessary by the Service, propose remedial actions. If any of the enhanced/restored/created habitats have not met a performance criterion during the initial 5-year period, the work proponent's maintenance and monitoring obligations will continue until the Service deems the enhancement/restoration successful, or contingency measures will be implemented.

- c. Annual reports will be submitted to the Service by August 1 of each year. These reports will assess both the attainment of yearly success criteria and progress toward the final success criteria. The reports will also summarize compliance with the conservation measures, reasonable and prudent measures, and terms and conditions of this Opinion.

PVG3 The following measures will be implemented at all off-site enhancement, restoration, and creation sites to avoid and minimize effects to migratory birds during the five-year restoration period:

- a. When maintenance and monitoring activities are conducted during the general migratory bird breeding season of February 15th to September 15th of each year, a qualified biologist will conduct a habitat assessment of the possibility for nesting birds no more than one week prior to the start of proposed activities.
- b. If nesting birds are observed on-site, no maintenance activities will be conducted within 100 feet of a nest (exclusion zone), except to repair broken irrigation lines. If an irrigation line is broken and workers need to encroach into the 100-foot exclusion zone, then the project proponent and the Service will be notified immediately. Prior to maintenance workers accessing the 100-foot exclusion zone, the project proponent and the Service will determine the most appropriate timing and method of repair without causing harm to the nest and/or the nesting pair.
- c. Herbicide application will occur outside of the 100-foot exclusion zone to avoid drift towards the nest. Only hand spraying downwind of the nest will be allowed. Herbicides will be applied strictly according to label instructions.
- d. An education program will be implemented by the project proponent to ensure that all enhancement, restoration, and creation site maintenance workers understand the work restrictions during the general bird breeding season and are aware of the above described conservation measures.

PVG4 The work proponent will establish an appropriate financial mechanism (determined using a program such as the Property Analysis Report (PAR) system) to fully implement all appropriate conservation measures.

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PVG5 The work proponent will ensure that long-term management of the conservation sites will occur. Within three months of the acquisition of the conservation parcels or easement, a draft management plan will be developed in coordination with the Service. The plan should be finalized within six months and implemented immediately following final sign off of all restoration activities for each parcel. If the conservation sites are transferred to a third party for long-term management, then an endowment with sufficient funds (determined using the PAR system or a PAR-like system) will be established subject to availability of funds, unless otherwise negotiated with the receiving party.

PVG6 All habitats to be restored, enhanced, created and/or preserved outside of the ROW, as stated above, will be managed and preserved in perpetuity. The work proponent will ensure there is a perpetual biological conservation easement over all properties used to offset impacts addressed in this Opinion and these lands will be managed according to a Service approved Long-Term Management Plan. The perpetual conservation easement and Long-Term Management Plan will be submitted to the Service prior to the start of the work.

Coastal California Gnatcatcher Conservation Measures

CGN1 Work in vegetation communities that support the gnatcatcher will be timed to avoid the breeding season (February 15 to September 1) to the extent practicable, unless the project proponent documents that the habitat to be affected is not occupied by the gnatcatcher. Occupancy surveys will be conducted during the breeding season to determine and document the presence/absence of breeding gnatcatchers.

Immediately prior to clearing vegetation outside of the gnatcatcher breeding season, the biologist will survey the work area for gnatcatchers. If gnatcatchers are found within the work footprint, the biologist will direct workers to begin initial vegetation clearing/grubbing in an area away from gnatcatchers. In addition, the biologist will walk ahead of clearing/grubbing equipment to flush birds toward areas of appropriate vegetation that are to be avoided. It will be the responsibility of the biologist to ensure that gnatcatchers will not be injured or killed by initial vegetation clearing/grubbing. The biologist will record the number and map the location of gnatcatchers disturbed by initial vegetation clearing/grubbing or construction and report these numbers and locations to the Service with 24 hours.

CGN2 For construction activities adjacent to occupied gnatcatcher habitat in which noise in excess of 60 dB(A) L_{eq} is produced or noise in excess of ambient noise levels if ambient noise levels exceed 60 dB(A) L_{eq} ; noise attenuation structures will be placed prior to the beginning of breeding season to reduce noise levels to 60 dB(A) L_{eq} or to ambient noise levels if ambient noise levels exceed 60 dB(A) L_{eq} , except as necessary for emergency activities. During construction adjacent to these areas, noise

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ATTACHMENT 5

CALIFORNIA COASTAL COMMISSION, FINDINGS FOR
BRIDGE DEMOLITION AND CONSTRUCTION, 4-97-216
(LACDPW), ADOPTED APRIL 12, 2007

We 8a

STATE OF CALIFORNIA - THE RESOURCES AGENCY

GRAY DAVIS, Governor

CALIFORNIA COASTAL COMMISSION

10TH CENTRAL COAST AREA
300 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 641-0142

Filed: 2/22/00
49th Day: 4/11/00
180th Day: 8/20/00
Staff: S. Hudson
Staff Report: 3/23/00
Hearing Date: 4/12/00
Commission Action:



STAFF REPORT: REGULAR CALENDAR

APPLICATION NO.: 4-97-216**APPLICANT:** Los Angeles County Department of Public Works**PROJECT LOCATION:** Old Topanga Canyon Road Bridge over Red Rock Creek,
Topanga; Los Angeles County**PROJECT DESCRIPTION:** Demolition of an existing 29 ft. wide, 30 ft. long wooden bridge and the construction of a new 35 ft. wide, 30 ft. long reinforced concrete slab bridge; placement of 140 sq. ft. of ungrouted rip rap; and approximately 1,123 cu. yds. of grading (340 cu. yds. of cut and 783 cu. yds. of removal and recompaction).**LOCAL APPROVALS RECEIVED:** N/A**SUBSTANTIVE FILE DOCUMENTS:** Bridge Replacement Alternatives Analysis by Los Angeles County Department of Public Works dated 3/21/00; Geotechnical Engineering Investigation Report Addendum by Los Angeles County Department of Public Works dated 2/15/00; Geotechnical Engineering Investigation Report by Los Angeles County Department of Public Works dated 11/3/94; Hazardous Waste and Biological Study Report by Parsons Engineering Science, Inc. dated 9/27/95.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends approval of the proposed project with eight special conditions as outlined on pages 3-5. The proposed project is for the demolition of an existing wooden bridge and the construction of a new reinforced concrete slab bridge in the same location. The Los Angeles County Department of Public Works has stated that the proposed improvements are necessary to meet current load carrying capacity code requirements and seismic standards for bridge crossings.

The project is located at the crossing of Old Topanga Canyon Road over Red Rock Creek. Red Rock Creek is designated as an environmentally sensitive habitat area (ESHA) by the previously certified Los Angeles County Malibu/Santa Monica Mountains Land Use Plan (LUP) and as a blue line stream by the United States Geologic Service. In addition, although the proposed project will not result in the removal of any oak trees, the project site is located immediately adjacent to an area designated as significant oak woodland by the LUP. The project will result in the unavoidable temporary loss of habitat for approximately 300 Mexican free-tailed bats which roost under the existing bridge to be demolished. Three letters in opposition to the proposed project have been received and are included as Exhibits 3a-c.

4-97-216 (LACDPW)
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I. STAFF RECOMMENDATION

MOTION: *I move that the Commission approve Coastal Development Permit No. 4-97-216 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a YES vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. Standard Conditions

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Compliance.** All development must occur in strict compliance with the proposal as set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. **Interpretation.** Any questions of intent or interpretation of any term or condition will be resolved by the Executive Director or the Commission.
5. **Inspections.** The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.
6. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

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III. Special Conditions**1. Riparian Habitat Restoration Plan and Monitoring Program**

Prior to the issuance of the permit, the applicant shall submit, for the review and approval of the Executive Director, a detailed Riparian Habitat Restoration Plan and Monitoring Program, prepared by a qualified resource specialist, for all areas of the project site disturbed by grading and construction activities and/or permanently displaced due to the installation of the proposed bridge improvements (ie. wingwalls, rip rap, etc.). The plans shall identify the species, extent, and location of all plant materials to be removed or planted and shall incorporate the following criteria:

a. Technical Specifications

The Restoration Plan shall provide for the restoration of riparian habitat destroyed or damaged by construction activities or permanently displaced by the proposed development at a 3:1 or greater ratio. The mitigation areas shall be delineated on a site plan and shall be located on or immediately adjacent to the project site. All invasive and non-native plant species shall be removed from the stream channel/riparian vegetation corridor on site. The stream channel/riparian vegetation corridor shall be revegetated with appropriate native riparian plant species.

The plan shall include detailed documentation of conditions on site prior to the approved construction activity (including photographs taken from pre-designated sites annotated to a copy of the site plans) and specify restoration goals and specific performance standards to judge the success of the restoration effort. Successful site restoration shall be determined if the revegetation of native plant species on site is adequate to provide 90% coverage by the end of the five (5) year monitoring period and is able to survive without additional outside inputs, such as supplemental irrigation. The plan shall also include a detailed description of the process, materials, and methods to be used to meet the approved goals and performance standards and specify the preferable time of year to carry out restoration activities and describe the interim supplemental watering requirements that will be necessary.

b. Monitoring Program

A monitoring program shall be implemented to monitor the project for compliance with the specified guidelines and performance standards. The applicant shall submit, upon completion of the restoration and enhancement planting, and on an annual basis beginning from the date that the restoration planting is completed (but no later than December 31st each year), a written report prepared by a qualified resource specialist, for the review and approval of the Executive Director, indicating the success or failure of the restoration project. This report shall include further recommendations and requirements for additional restoration activities in order for the project to meet the specified criteria and performance standards. These reports shall also include photographs taken from

4-97-216 (LACDPW)**Page 4**

pre-designated sites (annotated to a copy of the site plans) indicating the progress of recovery at each of the sites.

At the end of a five year period, a final detailed report shall be submitted for the review and approval of the Executive Director. If this report indicates that the restoration project has in part, or in whole, been unsuccessful, based on the approved performance standards, the applicant shall be required to submit a revised or supplemental program to compensate for those portions of the original program which were not successful. The revised, or supplemental restoration and enhancement program shall be processed as a coastal development permit.

2. Implementation of the Riparian Habitat Restoration Plan

The applicant shall commence to implement the Riparian Habitat Restoration Plan required by Special Condition Two (2) within 30 days after construction of the proposed development has been completed. The Executive Director may grant additional time for good cause.

3. Construction Monitoring

Prior to the issuance of the permit, the applicant shall retain the services of an independent resource specialist with appropriate qualifications acceptable to the Executive Director. The resource specialist shall be present on site during all construction activity. The monitor shall ensure compliance with all recommendations contained in the Hazardous Waste and Biological Study Report by Parsons Engineering Science, Inc. dated 9/27/95. Protective fencing shall be used around all oak trees and riparian vegetation which may be disturbed during construction activities. Protective fencing shall be used within all riparian areas to ensure that Pond Turtles and other terrestrial riparian fauna are excluded from the project site during construction activity.

The resource specialist shall immediately notify the Executive Director if unpermitted activities occur or if habitat is removed or impacted beyond the scope of the work allowed by Coastal Development Permit 4-97-216. This monitor shall have the authority to require the applicant to cease work should any breach in permit compliance occur, or if any unforeseen sensitive habitat issues arise. If significant impacts or damage occur to any oak trees or other riparian flora/fauna on site beyond the scope of work allowed for by this permit, the applicant shall be required to submit a revised, or supplemental, restoration program to adequately mitigate such impacts. The revised, or supplemental, restoration program shall be processed as an amendment to this coastal development permit.

4. Timing of Construction

Prior to the issuance of the coastal development permit, the applicant shall submit, for the review and approval of the Executive Director, a Construction Schedule for the proposed development which provides, to the maximum extent feasible, for the protection of the Mexican free-tail bats, Pond Turtles, and other sensitive riparian species which may be located on site through the avoidance of construction activities during applicable breeding seasons.

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Construction activity shall not occur during the rainy season (November 1 – March 31) unless the Executive Director determines that such a schedule is consistent with the intent of this condition and is necessary to minimize adverse effects to the riparian habitat and Mexican free-tail bats.

5. Construction Responsibilities and Debris Removal

The applicant shall, by accepting this permit, agree: a) that no stockpiling of dirt or construction materials shall occur in any riparian areas on the subject site including the stream bed or banks; b) that any hazardous materials, such as, but not limited to, timber containing creosote, shall either be temporarily stored in a non-riparian area of the project site using a plastic sheet barrier between the ground and the wood or be immediately removed from the project site consistent with Special Condition Four; c) a plastic sheet be placed underneath the bridge during all demolition/construction activity (during dry weather conditions) to ensure that no debris or materials enter the stream channel; d) that all grading shall be properly covered and sand bags and/or ditches shall be used to prevent runoff and siltation; and e) that measures to control erosion must be implemented at the end of each day's work. In addition, the staging area for the proposed project shall be limited to non-riparian areas only, no machinery will be allowed in the streambed at any time. The permittee shall remove from the riparian area any and all debris that result from the construction period.

6. Removal of Excavated and Hazardous Materials

Prior to the issuance of the coastal development permit, the applicant shall submit evidence, for the review and approval of the Executive Director, of the location of the disposal site for all excavated and/or hazardous materials from the site. Should the dump site be located in the Coastal Zone, a coastal development permit shall be required. All hazardous materials, including timber containing creosote, shall be disposed of at a location suitable for the disposal of toxic/hazardous materials.

7. Material/Design Specifications

Prior to the issuance of the coastal development permit, the applicant shall submit detailed plans, for the review and approval of the Executive Director, which show that: (1) all exposed surfaces of the approved bridge improvements, such as abutments or wing walls, shall be designed to include, or mimic, the native materials and appearance of the natural environment (such as the appearance of rock facing) and (2) the bridge shall be designed in a manner adequate to provide permanent bat habitat to mitigate for the loss of existing bat habitat on site consistent with the recommendations contained in the Hazardous Waste and Biological Studies Report by Parsons Engineering Science dated 9/27/95.

8. Required Approvals

Prior to the issuance of the coastal development permit, the applicant shall submit to the Executive Director a valid Streambed Alteration Agreement from the California Department of Fish & Game and a valid U.S. Army Corp of Engineers permit or evidence that such approval is not required.

IV. Findings and Declarations

The Commission hereby finds and declares:

A. Project Description and Background

The proposed project is for the demolition of an existing 29 ft. wide, 30 ft. long wooden bridge and the construction of a new 35 ft. wide, 30 ft. long reinforced concrete slab bridge in the same location; placement of 140 sq. ft. of ungrouted rip rap; and approximately 1,123 cu. yds. of grading (340 cu. yds. of cut and 783 cu. yds. of removal and recompaction). The Los Angeles County Department of Public Works has stated that the proposed improvements are necessary to provide for current load carrying capacity code requirements and seismic standards for bridge crossings. The project site is located at the crossing of Old Topanga Canyon Road over Red Rock Creek in the Old Topanga Canyon area of Los Angeles County (Exhibit 1). Demolition of the existing bridge will be conducted entirely from the roadway. The new reinforced concrete single-span bridge will provide approximately the same streamflow capacity as the existing bridge. Construction will be performed in two stages (1/2 of the bridge will be constructed at a time) to allow for one traffic lane to remain open at all times during construction activity. The new bridge will be only 6 ft. greater in width than the existing bridge to provide for current lane width requirements and will not serve to increase the number of available traffic lanes or capacity.

Red Rock Creek is designated as an environmentally sensitive habitat area (ESHA) by the previously certified Los Angeles County Malibu/Santa Monica Mountains Land Use Plan (LUP) and as a blueline stream by the United States Geologic Service. Red Rock Creek is a seasonal waterway with streamflow during the rainy season only. In addition, although the proposed project will not result in the removal of any oak trees, the project site is located immediately adjacent to an area designated as significant oak woodland by the LUP. The existing timber bridge currently provides habitat for approximately 300 Mexican free-tailed bats (*Tadarida brasiliensis*) which roost between the wood planks under the structure. The bats are native to the Santa Monica Mountains although migratory in nature returning to Mexico during the winter months. In addition, several species of special concern, such as the Southwestern Pond Turtle (*Clemmys marmorata pallida*) are known to exist in the Old Topanga Canyon Creek area and may potentially be found on site.

B. Hazards

Section 30253 of the Coastal Act states in part that new development shall:

- (1) *Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (2) *Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area*

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or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

The proposed development is located in the Santa Monica Mountains, an area which is generally considered to be subject to an unusually high amount of natural hazards. Geologic hazards common to the Santa Monica Mountains include landslides, erosion, and flooding. In addition, fire is an inherent threat to the indigenous chaparral community of the coastal mountains. Wild fires often denude hillsides in the Santa Monica Mountains of all existing vegetation, thereby contributing to an increased potential for erosion and landslides on property.

The proposed project is for the demolition of an existing 29 ft. wide, 30 ft. long wooden bridge and the construction of a new 35 ft. wide, 30 ft. long reinforced concrete slab bridge in the same location; placement of 140 sq. ft. of ungrouted rip rap; and approximately 1,123 cu. yds. of grading (340 cu. yds. of cut and 783 cu. yds. of removal and recompaction). The Los Angeles County Department of Public Works has stated that the proposed improvements are necessary to provide for current load carrying capacity code requirements and seismic standards for bridge crossings.

The proposed bridge replacement and grading will be implemented in accordance with the project plans prepared by engineers for LACDPW and with the guidelines contained within the "Standard Specifications for Public Works Construction" dated 1997. The Geotechnical Engineering Investigation Report by the Los Angeles County Department of Public Works dated 11/3/94, indicates that the proposed project is suitable from a geotechnical viewpoint. The report states:

Based on our field exploration and laboratory testing, it is concluded that competent bedrock is suitable for support of the proposed foundation due to its dense condition and relatively shallow depth.

In addition, the Los Angeles County Department of Public Works has indicated that the new reinforced concrete single-span bridge will provide approximately the same streamflow capacity as the existing bridge and will not result in any changes to streamflow velocity or increased downstream erosion. The Geotechnical Engineering Investigation Report Addendum by Los Angeles County Department of Public Works dated 2/15/00 states that:

The configuration of the concrete bridge will match the configuration of the existing timber bridge associated with the span and clearance, but the width of the bridge will be moderately increased to accommodate the widening of the above road. All improvements will be limited to the location of the proposed bridge with no modifications to the upstream and downstream areas of the stream. The proposed improvements will not affect the streamflow capacity.

***...
Therefore, the flowrate for the creek, the upstream and downstream creek velocities in the vicinity of the bridge, and the upstream and downstream erosion potential caused by the proposed improvements would not have any significant impacts.***

The proposed project also includes the placement of approximately 140 sq. ft. of ungrouted rip rap within the streambed at the terminus of two drainage outlets on either side of Old Topanga Canyon Road. The Los Angeles County Department of Public Works has indicated that the proposed rip rap is necessary to minimize erosion on site. The Department of Public Works has further indicated that the proposed rip rap will not result in any significant changes to streamflow velocity or result in increased erosion downstream. The Geotechnical Engineering Investigation Report Addendum by Los Angeles County Department of Public Works dated 2/15/00 states:

The placement of approximately 140 square feet of ungrouted rip rap at the two locations will minimize erosion of the drainage outlet. The absence of rip rap would cause uncontrolled erosion of streambed from the drain outlets of the overside road drain and the existing 12-inch diameter corrugated metal pipe...its placement will not have a significant impact on the flow velocity and downstream effects.

In addition, the Commission notes that the amount of new cut grading proposed by the applicant is larger than the amount of fill to be placed and will result in approximately 340 cu. yds. of excess excavated material. Excavated materials that are placed in stockpiles are subject to increased erosion. The Commission also notes that additional landform alteration would result if the excavated material were to be retained on site. In order to ensure that excavated material will not be stockpiled on site and that landform alteration is minimized, Special Condition Six (6) requires the applicant to remove all excavated material from the site to an appropriate location and provide evidence to the Executive Director of the location of the disposal site prior to the issuance of the permit. Should the dump site be located in the Coastal Zone, a coastal development permit shall be required.

The Commission also notes that no feasible less environmentally damaging alternatives exist to the proposed project that would ensure structural stability and public safety. A stream crossing for a road may only be achieved in one of three ways: (1) a bridge, (2) a culvert, or (3) an Arizona Crossing. The construction of a culvert or Arizona Crossing, rather than a new bridge, would require the placement of a large amount of impermeable surface within the streambed, increase stream flow velocity, result in potential increased downstream erosion, and result in significantly greater adverse effects to the habitat value of the site than the proposed project. Further, as stated above, the LUP identifies the use of bridges as the environmentally preferred method to provide for stream crossings in the Santa Monica Mountains. In addition, the Los Angeles County Department of Public Works has indicated that reinforcement, rehabilitation, or replacement (using timber material) of the existing timber bridge are not feasible alternatives and that construction of the new concrete bridge is necessary to ensure structural stability and public safety (Exhibit 4). The Bridge Replacement Alternatives Analysis by Los Angeles County Department of Public Works dated 3/21/00 states:

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The reinforcing or rehabilitation of the existing 64-year old, structurally deficient bridge with timber members (beams and piles) was considered, however, the composite structures of wood/concrete or wood/steel would be useless when existing timber members have rotted. The timber members of this bridge have been repeatedly exposed to water and sunlight. With the eminent rotting of these members, the bridge is approaching the end of its useful life. Although the exact remaining life can not be determined, the piles in the Red Rock Creek, if not replaced, will eventually crumble allowing the roadway to sink. Timber members often rot from within, so visual inspection of the piles above ground does not provide any indication of the structural integrity of the piles below the ground surface.

Shoring up the existing bridge requires new members to take the place of the timber members that are rotting. This is not feasible, since the new members placed in the creek under the existing timber beams would obstruct water flows under the bridge. The treatment of timber may result in leaching of pentachlorophenol, ammoniacal copper arsenate or chromated copper arsenate into the creek. Steel and concrete structures have considerably lower maintenance and a much longer service life.

As such, the Commission notes that reinforcement or rehabilitation of the existing timber bridge is not feasible. Although it is possible to construct a new timber bridge to replace the existing bridge on site, the Los Angeles County Department of Public Works has indicated that the construction of a steel and concrete structure, rather than timber, is the preferred alternative in order to minimize maintenance and ensure long-term structural stability and public safety. In addition, timber bridges are subject to potential damage and/or destruction from fire hazard. The loss of the timber bridge on the subject site during a wildfire event would result in the closure of an important transportation route for emergency vehicles and members of the public. Therefore, the Commission notes that no feasible alternatives to the proposed project exist which would serve to ensure structural integrity and public safety to a greater extent than the proposed project.

Therefore, for the reasons discussed above, the Commission finds that the proposed project, as conditioned, is consistent with Section 30253 of the Coastal Act.

C. Environmentally Sensitive Resources

Section 30230 of the Coastal Act states that:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms

and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30240 states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Sections 30230 and 30231 of the Coastal Act require that the biological productivity and the quality of coastal waters and streams be maintained and, where feasible, restored through among other means, minimizing adverse effects of waste water discharge and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flows, maintaining natural buffer areas that protect riparian habitats, and minimizing alteration of natural streams. In addition, Section 30240 of the Coastal Act states that environmentally sensitive habitat areas must be protected against disruption of habitat values.

To assist in the determination of whether a project is consistent with Sections 30230, 30231, and 30240 of the Coastal Act, the Commission has, in past coastal development permit actions for new development in the Santa Monica Mountains, looked to the certified Malibu/Santa Monica Mountains Land Use Plan (LUP) for guidance. The Malibu LUP has been found to be consistent with the Coastal Act and provides specific standards for development along the Malibu coast and within the Santa Monica Mountains. In its findings regarding the certification of the Malibu/Santa Monica Mountains LUP, the Commission emphasized the importance placed by the Coastal Act on protection of sensitive environmental resources finding that:

Coastal canyons in the Santa Monica Mountains require protection against significant disruption of habitat values, including not only the riparian corridors located in the bottoms of the canyons, but also the chaparral and coastal sage biotic communities found on the canyon slopes.

Specifically, Policy 78 of the LUP, in concert with the Coastal Act, provides that stream road crossings shall be undertaken by the least environmentally damaging feasible method. In addition, Policy 82 of the LUP, in concert with the Coastal Act, provides that grading shall be minimized to ensure that the potential negative effects of runoff and erosion on watershed and streams is minimized. Further, Policies 84 and 94, in concert

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with the Coastal Act, provide that disturbed areas shall be revegetated with native plant species within environmentally sensitive habitat areas and significant watersheds.

The stream located on the project site is designated as an environmentally sensitive habitat area (ESHA) by the previously certified Los Angeles County Malibu/Santa Monica Mountains LUP and as a blueline stream by the United States Geologic Service. Red Rock Creek is a seasonal waterway with streamflow during the rainy season only. In addition, although no oak trees are proposed to be removed as part of the proposed project, the subject site is located immediately adjacent to an area designated as significant oak woodland by the LUP. The existing timber bridge currently provides habitat for approximately 300 Mexican free-tailed bats (*Tadarida brasiliensis*) which roost between the wood planks under the structure. The bats are native to the Santa Monica Mountains although migratory in nature, returning to Mexico during the winter months. Although not a species of special concern, the bats fill an important niche in the Santa Monica Mountains ecosystem and in controlling local insect and mosquito populations. In addition, several species of special concern, such as the Southwestern Pond Turtle (*Clemmys marmorata pallida*) are known to exist in the Old Topanga Canyon Creek area and may potentially be found on site.

In the case of the proposed project, the Commission notes that the proposed replacement of the existing timber bridge with a new concrete bridge will serve to increase the structural stability of the bridge crossing on the subject site and ensure public safety. However, the Commission also notes that seasonal streams, such as the creek located on the subject site provide important habitat for riparian plant and animal species. Section 30231 of the Coastal Act provides that the quality of coastal waters and streams shall be maintained and restored whenever feasible. In past permit actions, the Commission has found that new development within riparian areas, such as the proposed project, results in potential adverse effects to riparian habitat and marine resources from increased erosion, contaminated storm runoff, disturbance to wildlife, and loss of riparian plant and animal habitat. Further, although the proposed new single-span reinforced concrete bridge will be located in approximately the same location as the existing timber bridge to be demolished, the Commission notes that construction activities and placement the new larger bridge, wingwalls, and rip-rap will result in potential adverse effects to riparian habitat and marine resources from increased erosion, contaminated storm runoff, disturbance to wildlife, and loss of riparian plant and animal habitat. As discussed above, the Coastal Act requires that environmentally sensitive habitat areas, such as the subject site, be maintained, enhanced, and where feasible, restored. Therefore, in order to mitigate adverse effects to riparian habitat from the proposed project, Special Condition One (1) requires the applicant to submit a detailed Riparian Habitat Restoration Plan and Monitoring Program, prepared by a qualified resource specialist, for all areas of the project site disturbed by grading and construction activities and/or permanently displaced due to the installation of the proposed bridge improvements (ie. wingwalls, rip rap, etc.). The Restoration Plan shall provide for the restoration of all riparian habitat destroyed or damaged by construction activities or permanently displaced by the proposed development at a 3:1 or greater ratio.

The mitigation areas shall be delineated on a site plan and shall be located on or immediately adjacent to the project site. All invasive and non-native plant species shall be removed from the stream channel/riparian vegetation corridor on site. The stream channel/riparian vegetation corridor shall be revegetated with appropriate native plant species. In addition, Special Condition One (1) also requires the applicant to submit annual reports indicating the success or failure of the restoration effort for a period of five years to ensure the success of the Riparian Habitat Restoration Plan. If the restoration effort is in part, or in whole, unsuccessful, the applicant shall be required to submit a revised or supplemental restoration program. Special Condition Two (2) has been required to ensure that the Riparian Habitat Restoration Plan required by Special Condition One (1) will be implemented in a timely manner.

In addition, the Commission notes that the proposed grading and construction activity will be located within an environmentally sensitive riparian habitat area, as well as in proximity to several oak trees and that the proposed grading may result in potential adverse effects to those resources. In order to ensure that any potential adverse effects to the oak trees and riparian habitat on the project site are minimized, Special Condition Three (3) requires the applicant to retain the services of an environmental resource specialist to be present on site during all construction activity. In addition, Special Condition Three (3) also requires the use of protective fencing around all oak trees or riparian vegetation which may be disturbed by the proposed construction activity and the use of protective fencing to ensure that Pond Turtles and other terrestrial riparian fauna are excluded from the project site during construction activity. The monitor shall have the authority to require the applicant to cease work should any breach in permit compliance occur, or if any unforeseen sensitive habitat issues arise. If significant adverse effects or damage to the habitat value of the site occur as a result of the proposed construction activity, beyond that allowed by this permit, the applicant shall be required to submit a revised, or supplemental, restoration program to adequately mitigate such adverse effects. The revised, or supplemental, restoration program shall be processed as an amendment to this coastal development permit.

Further, the applicant has submitted a Hazardous Waste and Biological Studies Report by Parsons Engineering Science dated 9/27/95 which indicates that although the soil on the project site is not contaminated, the timber of the existing bridge to be demolished has been previously treated with creosote (classified a hazardous waste by the United States Environmental Protection Agency) and that, therefore, the demolition of the existing timber bridge may result in potential adverse effects to the surrounding riparian habitat. The report states:

Analytical results indicated that the soil has not been impacted, and is considered clean. The wood, however, is classified as a RCRA waste (EPA Hazardous Waste Number D026). Therefore, during bridge dismantlement activities, all wood material should be prevented from contacting the soil.

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Based on the wood composite analytical results, disposal options for the wood are either landfill or incineration. Tentative landfill disposal locations are in the states of California and Colorado. Tentative incineration locations are in the states of Utah or Kansas.

Therefore, in order to ensure that adverse effects to the riparian habitat from hazardous materials are minimized, Special Condition Five (5) requires that any hazardous materials, such as, but not limited to, timber containing creosote, shall either be temporarily stored in a non-riparian area of the project site using a plastic sheet barrier between the ground and the wood or be immediately removed from the project site consistent with Special Condition Six (6). Special Condition Five (5) further requires that a plastic sheet be placed underneath the bridge during all demolition/construction activity (during dry weather conditions) to ensure that no debris or materials enter the stream channel. In addition, Special Condition Six (6) requires the applicant to submit evidence, for the review and approval of the Executive Director, of the location of the disposal site for all excavated and/or hazardous materials from the site. Should the dump site be located in the Coastal Zone, a coastal development permit shall be required. All hazardous materials, including timber containing creosote, shall be disposed of at a location suitable for the disposal of toxic/hazardous materials.

In addition, the Commission notes that construction activity within an environmentally sensitive stream channel, such as the proposed project, will result in the potential generation of debris and/or presence of equipment and materials that could be subject to streamflow. Further, If construction site materials are discharged into the marine environment or left inappropriately/unsafely exposed on the project site, such discharge to the marine environment would result in adverse effects to sensitive riparian habitat. To ensure that adverse effects to the marine environment are minimized, Special Condition Five (5), also requires the applicant to ensure that stockpiling of construction materials shall not occur in any riparian areas on the subject including the streambed or banks, that no machinery will be allowed in the streambed at any time, all grading shall be properly covered, and that sand bags and/or ditches shall be used to prevent runoff and siltation.

As previously discussed, the existing timber bridge currently provides habitat for approximately 300 Mexican free-tailed bats (*Tadarida brasiliensis*) which roost between the wood planks under the structure. The bats are native to the southern United States and Mexico and migratory in nature, returning to Mexico during the winter months. Although the bats are not considered a sensitive species, the Commission notes that the bats fill an important niche within the Santa Monica Mountains ecosystem providing insect and mosquito population control. Removal of the existing bridge, will destroy the roost of the bats and is an unavoidable impact of the proposed project. The Hazardous Waste and Biological Studies Report by Parsons Engineering Science dated 9/27/95 states:

Removal of the existing bridge will destroy the roost of the Mexican free-tailed bats. This species does not have a special status and is considered common. However, the loss of a roosting location may be considered significant...The new concrete bridge can be

designed to be "bat friendly," ie., holes and crevices can be added to the design that may be used by bats for roosting.

As noted in the Hazardous Waste and Biological Studies Report by Parsons Engineering Science dated 9/27/95, the proposed project will result in the unavoidable temporary loss of bat habitat during construction. In order, to mitigate the temporary loss of bat habitat, the applicant, in conjunction with the local Cub Scouts Troop, has previously installed several temporary wooden bat houses in the area immediately surrounding the project site to provide temporary housing during construction. Although the bats have not yet utilized the temporary bat houses, the applicant's biological consultant has indicated that the bats will likely utilize the temporary bat houses only after the actual demolition of the existing roost. Bats which do not utilize the temporary housing during construction of the new bridge are expected to join other groups of Mexican free-tailed bats which have established roosts under two other bridges in the Old Topanga Canyon Area. However, in order to ensure that the proposed project will not result in the permanent loss of bat habitat in the Santa Monica Mountains, Special Condition Seven (7) requires that the proposed bridge be designed in a manner adequate to provide permanent bat habitat consistent with the recommendations contained in the Hazardous Waste and Biological Studies Report by Parsons Engineering Science dated 9/27/95.

Further, the Commission notes that, in addition to the Mexican free-tailed bats, several other animal species, including some species of special concern, such as the Southwestern Pond Turtle (*Clemmys marmorata pallida*), are known to exist in the Old Topanga Canyon Creek area and may potentially be found on site. The Commission further notes that disturbance and noise from construction activity, in addition to the temporary loss of habitat, will result in adverse effects to the native animal species located on the subject site. The applicant's biological consultants have indicated that construction activity should be limited to certain times of the year (primarily late spring through early fall) in order to avoid breeding seasons of certain species including the Mexican free-tailed bats and Pond Turtles. The applicant has indicated that all construction activity will be limited to a period between August and January to avoid disrupting the bats' breeding season. However, the applicant has not submitted a finalized construction schedule as part of this application. Further, the Commission notes that the above referenced general timing schedule for construction would allow for development to occur during the rainy season when adverse effects to the riparian habitat from construction activities would be greatest. Therefore, in order to ensure that adverse effects to the habitat value of the subject site are minimized, Special Condition Four (4) requires the submittal of a Construction Schedule for all construction activity which provides, to the maximum extent feasible, for the protection of the Mexican free-tail bats, Pond Turtles, and other sensitive riparian species which may be located on site through the avoidance of construction activities during applicable breeding seasons. Construction activity shall not occur during the rainy season (November 1 – March 31) unless the Executive Director determines that such a schedule is consistent

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with the intent of this condition and is necessary to minimize adverse effects to the riparian habitat and Mexican free-tail bats.

The Commission notes that any development located within a stream channel will require a Streambed Alteration Agreement from the California Department of Fish and Game and approval from the United States Army Corp of Engineers. In this case, the applicant has previously submitted a Stream Alteration Agreement from the Department of Fish and Game dated 11/19/97 for the proposed project. However, the Streambed Alteration Agreement expired on 11/1/98. Therefore, Special Condition Eight (8) has been required to ensure that, prior to the issuance of a coastal permit, the applicant shall submit to the Executive Director a valid Streambed Alteration Agreement or other evidence of approval from the California Department of Fish & Game and a valid U.S. Army Corp of Engineers permit or evidence that such approval is not required.

Therefore, for the reasons discussed above, the Commission finds that the proposed amendment, as conditioned, is consistent with Sections 30230 and 30231 of the Coastal Act. However, the Commission notes that Section 30240 of the Coastal Act limits development in areas designated as ESHA, such as the subject site, to only those uses dependent upon such resources. The Commission further finds that the proposed development (the construction of a bridge) is not a resource dependent use and is, therefore, not consistent with Section 30240 of the Coastal Act.

Section 30007.5 of the Coastal Act provides the Commission with the ability to resolve conflicts between Coastal Act policies. This section provides that:

The legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

1. Conflict

In order for the Commission to utilize the conflict resolution provision of Section 30007.5, the Commission must first establish that there is a substantial conflict between two statutory directives contained in Chapter 3 of the Coastal Act. The fact that a project is consistent with one policy of Chapter 3 and inconsistent with another policy does not necessarily result in a conflict. Rather, the Commission must find that to deny the project based on the inconsistency with one policy will result in Coastal Zone effects that are inconsistent with another policy.

In this case, the proposed project is inconsistent with the environmentally sensitive habitat protection policies of the Coastal Act because the proposed development (a bridge) is not an allowable use within an environmentally sensitive habitat area (ESHA)

as identified by Section 30240. Specifically, Section 30240 of the Coastal Act limits allowable uses within an ESHA to "only uses dependent on those resources." However, as discussed in detail above, the proposed project is for the replacement of an existing bridge which the Los Angeles County Department of Public Works has stated is not adequate to provide for current load carrying capacity code requirements and seismic standards for bridge crossings. Old Topanga Canyon Road is an important roadway and is a crucial transportation link in the Topanga Canyon area of the Santa Monica Mountains. In addition, failure of the existing bridge or failure to reconstruct a new bridge after demolition would sever an important public transportation corridor in the Santa Monica Mountains and severely limit access to hundreds of homes in the surrounding area (including emergency vehicle access) creating a hazardous condition in an area prone to wildfire activity. As such, the Commission notes that the proposed project is necessary to ensure the stability and structural integrity of an existing stream crossing and will serve to minimize risks to life and property as required by Section 30253 of the Coastal Act.

In addition, the Commission notes that the riparian habitat on the subject site has been previously developed with the existing bridge to be demolished. The proposed new bridge will be located in approximately the same footprint as the existing bridge (the replacement bridge will be 6 ft. greater in width to meet current traffic lane width standards) with the addition of approximately only 140 sq. ft. of ungrouted rip rap and slightly larger wingwalls in the streambed. As such, the proposed project will result in relatively few new adverse effects to the riparian habitat on site.

The Commission also notes that no feasible less environmentally damaging alternatives to the proposed project exist. A stream crossing for a road may only be achieved in one of three ways: (1) a bridge, (2) a culvert, or (3) an Arizona Crossing. The construction of a culvert or Arizona Crossing, rather than a new bridge, would require the placement of a large amount of impermeable surface within the streambed, increase stream flow velocity, result in potential increased downstream erosion, and result in significantly greater adverse effects to the habitat value of the site than the proposed project. Further, as stated above, the LUP identifies the use of bridges as the environmentally preferred method to provide for stream crossings in the Santa Monica Mountains.

In addition, as previously discussed in detail, the Los Angeles County Department of Public Works has indicated that reinforcement or rehabilitation of the existing timber bridge is not a feasible alternative because all existing wood components of the 64-year old bridge would need to be replaced in their entirety to ensure structural stability (effectively constituting the construction of a new timber bridge). However, the Commission notes that the construction of a new timber bridge, although resulting in the same short-term adverse effects during construction, would result in greater potential long-term adverse effects to the habitat value of the site than construction of the proposed concrete bridge due to the potential leaching of hazardous chemicals (necessary for preservation of timber structures) into the sensitive riparian habitat

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including creosote, pentachlorophenol, ammoniacal copper arsenate, and chromated copper arsenate. In addition, timber bridges are subject to damage and/or destruction from fire hazard. The loss of the timber bridge on the subject site during a wildfire event would result in the closure of an important transportation route for emergency vehicles and members of the public. As such, the Commission notes that reinforcement or rehabilitation of the existing timber bridge is not a feasible alternative and that the construction of a new timber bridge, rather than the proposed concrete bridge, would not serve to reduce or minimize adverse effects to the habitat value of the site. Therefore, the Commission notes that no feasible less environmentally damaging alternatives to the proposed project exist.

In conclusion, the proposed project will allow for the construction of a non-resource dependent use within an area designated as environmentally sensitive habitat and is; therefore, not consistent with Section 30240 of the Coastal Act. However, this project will serve to ensure structural and geologic stability on the subject site and minimize risks to life and property. Without construction of the proposed project, significant potential adverse effects to public safety will occur. Therefore, the Commission finds that the proposed project creates a conflict among Coastal Act policies.

2. Conflict Resolution

After establishing a conflict among Coastal Act policies, Section 30007.5 of the Coastal Act requires the Commission to resolve the conflict in a manner that is on balance most protective of coastal resources. In this case, the proposed new bridge, although located in an ESHA, will be sited in approximately the same footprint as the existing bridge (the replacement bridge will be 6 ft. greater in width to meet current traffic lane width standards) with the addition of approximately only 140 sq. ft. of ungrouted rip rap in the streambed. The proposed bridge will not be expanded to provide for additional traffic lanes or capacity. As such, the proposed project will not occupy a significantly larger area of the subject site than the existing bridge and will result in relatively few new adverse effects to riparian habitat on site. On the other hand, however, the proposed project will ensure structural and geologic stability on the subject site. In conclusion, the Commission finds that denial of the proposed project would result in significant adverse effects to coastal resources.

As such, in resolving this conflict, the Commission finds that the adverse effects on coastal resources from not constructing the project will be more significant than the project's impacts to the habitat value of the site. Therefore, the Commission finds that approving the project is, on balance, most protective of coastal resources.

D. Visual Resources

Section 30251 of the Coastal Act states that:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinated to the character of its setting.

The proposed project includes the replacement of an existing timber bridge in a rural area of Topanga with a new concrete bridge and larger wingwalls in approximately the same location. The Commission notes that the new proposed concrete bridge will serve to increase the structural stability of the bridge crossing on the subject site and ensure public safety. However, the Commission also notes that the new concrete bridge, which will be visible from Old Topanga Canyon Road, will be more urban in appearance and will be less consistent with the rural nature of the area surrounding the project site than the existing timber bridge. Therefore, in order to ensure that any adverse effects to public views resulting from the proposed development are minimized, Special Condition Seven (7) requires that the surface of the proposed bridge wingwalls and other non-road surface areas be designed to include, or mimic, the color and texture of native materials and appearance of the natural environment (such as the appearance of rock facing). Therefore, for the reasons discussed above, the Commission finds that the proposed development, as proposed, will not result in any adverse effects to public views and is consistent with Section 30251 of the Coastal Act.

E. Local Coastal Program

Section 30604 of the Coastal Act states that:

a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

Section 30604(a) of the Coastal Act provides that the Commission shall issue a Coastal Permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with Chapter 3 policies of the Coastal Act. The preceding sections provide findings that the proposed project will be in conformity with the provisions of Chapter 3 if certain conditions are incorporated into the project and accepted by the applicant. As conditioned, the

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proposed development will not create adverse impacts and is found to be consistent with the applicable policies contained in Chapter 3. Therefore, the Commission finds that approval of the proposed development, as conditioned, will not prejudice the City's ability to prepare a Local Coastal Program for Malibu which is also consistent with the policies of Chapter 3 of the Coastal Act as required by Section 30604(a).

F. CEQA

Section 13096(a) of the Commission's administrative regulations requires Commission approval of Coastal Development Permit application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The Commission finds that, the proposed project, as conditioned will not have significant adverse effects on the environment, within the meaning of the California Environmental Quality Act of 1970. Therefore, the proposed project, as conditioned, has been adequately mitigated and is determined to be consistent with CEQA and the policies of the Coastal Act.

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ATTACHMENT 6

TRANSCRIPT, "ROUNDTABLE DISCUSSION" ON "IMPACTS
OF BOLSA CHICA DECISION ON HOUSING,
TRANSPORTATION AND THE ENVIRONMENT IN SAN DIEGO
COUNTY, HELD NOVEMBER 18, 1999

**TRANSCRIPTS OF
DUCHENY ROUNDTABLE
DISCUSSION**

Roundtable Discussion

**“Impacts of Bolsa Chica Decision on Housing, Transportation
and the Environment in San Diego County ”**

San Diego County Administration Office
Room 301
1600 Pacific Highway
San Diego, CA 92101
November 18, 1999 from 1:00 p.m. to 3:30 p.m.

Introduction.	Assemblywoman Denise Ducheny Assemblywoman Patricia Bates
Opening Comments.....	Members in Attendance
Historical Perspective of Coastal Act/Commission.....	William Boyd
Coastal Commission View.....	Peter Douglas, Executive Director
Moderated Discussion of Issues and Concerns.....	Invited Participants
Closing Comments.....	Assemblymember Ducheny

Assemblywoman Denise Ducheny

I want to go ahead. I'm hopeful that Pat will be here soon but I want to get started because it would be my eternal hope to be able to get out of here by about 3:30. I don't know what kind of planes...I know some people came down here from Sacramento but we want to get you out again while the sun is still shining in San Diego. We'd hate to have you get out and have it be dark. I do want to take the opportunity to thank everybody for your interest in this topic, and for being here.

I want to have everybody, initially, introduce themselves, not only the people that are sitting here but also the people in the audience so we have a sense, since this is intended not to be some sort of formal hearing so much as an actual dialogue and to give us all, I think, a better understanding of what's going on with this issue what the impact of the decision has been. Whether there is a need for any type of legislative action in that regard but primarily, I think, today as a beginning really just to understand what the issues are, what kind of developments have been done in these areas, what kinds of mitigations we've seen, what the impacts of those can and will be in the future.

I want to ask everybody to, initially we're going to go around and introduce ourselves, everybody that's here, your affiliation, if you're with a company, if you're with a group, if you're representing an association or any type of a group please state that representation so we'll know. I want to let everybody know, through the courtesies of the County, we have these microphones in front of people who are sitting at these tables. There's a little switch down there that you can either flip up and down or sideways, depending on which mic you're on.

We want everybody to be able to put their ideas out there, to have any different interpretations we have of this decision and its impacts on the table. I would like, if we can, take the first, I suspect it will take I'm guessing half an hour to 45 minutes to maybe just lay out the framework. If it can be less that's okay. We want this to be a fairly informal process and open to discussion, so people who are not at this more formal table, please, we still want to hear from you especially if you have suggestions, ideas, as we've heard, after we've heard sort of the initial presentations from several different points of view.

I wanted to say, the County did arrange for us to record this. That's part of what the microphone's are about so it not only helps people in the back here but it does have a recording device. That's not to intimidate anybody and not to hold anybody to anything they say but to allow us to at least be able to take into account, if we don't all take the notes right, kind of different ideas or ways that people have perceived this but it's not a tape for some other kind of formal purposes other than to help us all remember as we go back. It's a fairly complex issue, and particularly for members.

I'll speak for myself and probably Pat and any others who may be here. For us often it's helpful to be able to go back and say, now how did we say that, and, gee, I liked what somebody said but I don't remember exactly what that was. We like to be able to have the opportunity to do that so that's what the microphones are about. Let's start. For anybody who doesn't know me I'm Assemblywoman Ducheny.

I represent the South Bay district in San Diego which includes the Tijuana River Valley, the Otai River Valley, the Sweetwater Marsh and a variety of important wetlands areas. --- if there's any federal people here but if anybody can figure out how to make this decision apply to the U.S. Army Corps of Engineers I'm really open to that. I'm interested in this, not really so much I don't know that its huge impacts directly in my district but it is a statewide issue of some importance. A lot of us have worked with wetlands issues over time and as budget chair and amongst some other hats that I wear, I think it's an issue that we all need to look at. Let me go, we'll go this way. We'll go with Joan first I guess. Just say who are and why you're here.

Joan Jackson: I'm Joan Jackson. I'm with the League for Coastal Protection and CELP, the California Environmental Law Project.

Larry Silver: I'm Larry Silver. I've been active in coastal litigation for a number of years. Currently I'm also with the California Environmental Law Project.

Scott Wetch: Scott Wetch with the California State Building and Construction Trades Council, representing approximately 350,000 unionized members of the Construction Trades.

Bill Boyd: I'm Bill Boyd and one of the many coastal staff alumni that I see here today, and I'm basically an itinerant lawyer who represents land owners and done some environmental group work and probably of the 100+ people who have claimed to have been heavily involved in drafting the Coastal Act. I was one of the three along with Peter Douglas and Joe Petrillo who actually did.

Laura Isenberg: Laura Isenberg, Orange County Transportation Corridor Agencies.

Art Lujan: Art Lujan. I'm the Business Manager of the San Diego Building Trades Council and Vice President of San Diego/Imperial Counties Labor Council, representing 110,000 working men and women in San Diego County.

Patricia McCoy: I'm Patricia McCoy. I'm a council person in the City of Imperial Beach. I'm also Vice President of the Southwest Wetlands Interpretive Association, and have a great deal to do with restoration projects in the Tijuana River Valley and in the new San Diego Bay National Wildlife Refuge.

Ned Washburn: I'm Ned Washburn. I'm a private attorney in San Francisco. I represent private interest primarily.

Assemblywoman Ducheny:

Let me take a moment here, I wouldn't have gone this way but my colleague has arrived and I want Pat to be able to say hello and anything she wants to do and then we'll go this way around.

Patricia Bates:

Good morning, I guess it's good afternoon now, stuck in a little traffic. I know we're not here for traffic today but at the next hearing I'll talk about that. It's a pleasure to be here. I represent the 73rd Assembly District, which is South Orange County and North San Diego County, and was pleased when Assembly member Ducheny asked me to join because we have many of these issues in my community. So I'm looking forward to testimony and I'm glad to be with you today.

Assemblywoman Ducheny:

Let me just introduce my staff just so we get them all. This is Chris Woods, he's with my Sacramento office and a chief budget consultant but last year chaired staff to the Assembly Subcommittee on Resources. So he's been working in the resources area for a while. In the back, and if you need anything and the folks that helped organize this, Edgar Ruiz, wave your hands. Edgar's back there and Claudia Savayas, that are from my district office staff as well. So if anybody needs anything during the course of this, they're here to answer any side questions you may have.

Kevin Johnson: Kevin Johnson with the Planning and Conservation League.

Bill Craven: Bill Craven. I'm the State Director for Sierra Club, California based in Sacramento.

Tom Johnson: Tom Johnson with the Port of Long Beach.

Ralph Faust: Ralph Faust, Chief Counsel with the California Coastal Commission.

Peter Douglas:

Peter Douglas, Executive Director of the California Coastal Commission.

Christine Kehoe:

Christine Kehoe, San Diego City Council member and California Coastal Commissioner

Assemblywoman Ducheny:

Anybody else back there? I can't see everybody and a lot of you weren't standing up. We're going to try to get this thing moved because I can't see everybody back there. I think what we'll do when we get to the stage where people, actually if we just move one of those chairs over here by this microphone and anybody that ends up coming up, if you want to make comments later as we go through this. Let me just, a couple ground rules. The essence of this idea is that we get some background, we understand the issues, and then we can have some discussion about it and everybody gets to hear everybody's discussion.

People who are at the tables and have these little cool things, beyond after we've had a couple of people that we wanted to give the overview, people who want to talk or ask questions or make comments, this is a technique I learned from ---, and if any of you have ever been to a C.V. seminar you hold it up like that and then we know you want to talk and we don't have to jump up and down and wave around. Then we'll open it up after some discussion here to people to ask questions, and people, unfortunately, who are sitting out there in those other chairs will have to raise your hands and we'll have to see you.

So we're going to try to get that podium moved. Oh, it's got wires and I can't see through it. Alright, well then at least let's move one of these chairs over to this microphone so that if anybody from there ends up coming up they can talk into that microphone, and then you can talk to that microphone once we get there. Okay, with that let me start. We had asked Bill Boyd, as one of the senior former staff members who was involved with drafting the Coastal Act, to start this with an overview. Then Peter you or your staff, however you guys want to divide that up, to give sort of what the Coastal Commission's seen, how they've seen implementing this, how they've interpreted the decision. Then we'll move into a broader discussion where we'll kind of start with a short version of the perspectives of some of the different interests that are here and then move into a broader discussion. So, you're on. Try to keep it at 10 minutes or less.

Bill Boyd:

Okay. In terms of, I've been asked to try to give some historical perspective on Commission practices. I did start with the Commission in 1973 as a senior permanent analyst, and became the Commission's first Chief Counsel under the Permanent Act. To give you an idea of how long ago that was, I had brown hair instead of gray hair, and Peter Douglas simply had hair. I can attribute mine to teenagers, I don't know what Peter's excuse is. I would like to comment on four areas of Commission historic practice that are strongly affected by the Bolsa Chica decision, and I suspect that Jamie Jordan Patterson will correct me on any misstatements of the court's holding. Although it's fairly sweeping in many ways.

The four topics I'd like to touch on are, one, treatment of degraded wetlands under Coastal Act, Section 30411, in the Commissions interpretive guidelines. Second, allowed uses under Coastal Act, Section 30233, which is the wetlands section in the context of the conditions definition of wetlands, and particularly the implications for linear facilities such as bridges and coastal access roads as they've been treated historically. Third, ESHAs, under Coastal Act, Section 30240, as their environmentally-sensitive habitat areas, I think we probably all know the term by now, and the role of Coastal Act balancing under Section 30007.5 of the Act, which is a broad balancing position. And finally, the use of 3007.5 with respect to large scale LCP and project planning in the context of the court's decision.

The first topic, the treatment of degraded wetlands under Section 30411. That section of the Act has some fairly stringent tests. A wetland has to be so severely degraded that major restoration is required. At least 75% of the wetland is restorable to highly-productive wetland in conjunction with boating facility. The third test, and the one that's sort of left hanging, I think, or not actually hanging, was limited by the court decision whether restoration can

most feasibly be achieved with a boating facility or whether there are other feasible ways to achieve such values. Historically, many wetlands, particularly in Southern California, are very severely degraded or degraded and often scattered into small non-contiguous areas.

When the Coastal Commission reviewed the Coastal Conservancy Plan for the Hellman Ranch area, which the Commission's recently revisited, the Commission actually determined that the no-project alternative, leaving it alone, was not a feasible alternative because the wetlands were so degraded. In some instances boating facilities just simply are infeasible. I mean you have wetlands in that area where you simply can't put a boating facility. I worked for the Coastal Conservancy in the Los Cerritos Restoration Plan in the early 1980s, and that's a classic example of a severely degraded wetland where you simply couldn't put a boating facility unless you want to have a one-canoe lagoon when you're done.

Another point, in terms of the Commission's balancing and that the court clearly rejected in the Bolsa Chica decision, was that boating facilities may have greater impacts than other uses. The Commission's interpretive guidelines allowed for a consideration of other uses if they would have fewer environmental impacts and greater benefits for wetland restoration and a higher mitigation ratio would be required. Bolsa Chica, unfortunately, was a classic example of that.

The 1986 land-use plan approved by the Commission, if you compare that with the '96 plan, the '96 plan actually provided 200 more acres of wetlands than the 1986 plan without a marina, and it didn't have marina side effects. The court's decision, though, I think really effectively limits the severely degraded wetland provisions to boating facilities. I think that is, obviously, contrary to what's in the interpretive guidelines and in the Commission's historic practices.

The second point involves allowable uses under Coastal Act, Section 30233. That is the wetlands section of the Coastal Act. To put this in sort of a context it's important to understand that the Commission uses a broader definition of wetlands than our favorite agency, the Corps of Engineers. The Corps requires three indicator factors: hydrology, hydric soils and hydric vegetation. The Commission test is a one-part test. If you meet any one of the three it's a wetland. Generally this will result in a broader, simply physical area that's considered a wetland under the Coastal Act in many circumstances.

The Bolsa Chica decision, in my reading of it, indicates that only the specific uses set forth in Coastal Act, Section 30233, can be allowed in wetlands. Apparently in another section of the decision the court appears to say that the balancing provision of the Coastal Act, 30007.5, cannot be used in conjunction with Section 30233. In the past the Commission has interpreted, at least the incidental public services provision of Section 30233, to allow expansions of existing roads and bridges. And in the past the Commission has also allowed new bridges and new roads. For instance, a new bridge over the Carmel River.

However, the Bolsa Chica decision doesn't even allow the expansion of an existing road under Section 30233, and the court felt that the Commission's interpretation of incidental public services didn't meet the litmus test. As an example of using 30007.5 of the Coastal Act, when the San Joaquin Hills Corridor Project was approved by the Commission, it involved fill of 1/4 of an acre to bridge a flood control channel and, in my reading of the decision, is it's extremely unlikely that that would be allowed under the act now, even though the Commission's findings at the time sighted the coastal access benefits of that road because it was relieving traffic on Pacific Coast Highway.

So allow the uses under the Act, in my reading of the decision, are limited to the enumerated uses and, secondly, that I don't think 30007.5 can be used in conjunction with 30233 in reading the court's language. It came very close to simply saying you can't do it.

The third area is addressing ESHAs under Coastal Act, Section 30240, particularly degraded ESHAs and isolated ESHAs. The decision is very strong on this although the court's factual findings seem to differ from the Commission's. It found that the ESHA involved was a degraded wetland. The Commission found that it was dying.

One thing that's important to understand, though, is the decision involved, the Commission's interpretation of what's allowable under 30240 itself. The court's decision did not say that you cannot use 30007.5 in conjunction with ESHAs, unlike, what I think it said, with wetlands. However, when you look at the facts of the case and the court's discussion, it's very hard to find how you could actually use the balancing provision of 30007.5 in the event that the Commission determined that you had a very isolated wetland or a degraded ESHA, and that it would be better to actually relocate that ESHA to a higher-value area with a high mitigation ratio.

As I said, the ESHA that was involved in the Bolsa Chica decision was determined by the Commission to actually be dying not degraded, and there was a 4-1 mitigation ratio that would have been planted, that would have been native vegetation in the middle of a committed park area adjacent to the Bolsa Chica Wetlands. Whether that's good or not I think it's important to understand that the court was looking at that context and said, that doesn't seem to be appropriate.

In terms of the implications of that, I'd like to go on the fourth point, and that is that the Commission in the past has used 30007.5, and this is the balancing provision of the Act that allows the Commission to determine that if overall on balance it's more protective of coastal resources to concentrate development in one area and create large blocks of habitat in the other, the Commission's entitled to make that. The Bolsa Chica court indicated that when you apply 30007.5, the Commission must show why preservation of ESHAs in place is "unworkable."

However, in the past, the Commission has looked at large-scale LCPs, several in Orange County and elsewhere, and has looked at the overall framework of the land areas and determined that preserving large blocks of habitat that are concentrated, so that you can properly buffer habitat and protect habitat systems is more protective and in turn concentrating development in other areas that impact ESHAs is more protective than trying to preserve isolated habitats on a project-by-project basis. Whether that's good or bad that's the way the Commission has applied it. And some fairly major green belt and habitat preserves have been established in the process.

There is a concern that the balancing provisions of 30007.5 are too broad and don't provide specific review criteria. I'm just basically reading that into what the court said in that case and how the court in the Bolsa Chica case and how the court contrasted it with its earlier decision on the Bodaquitos Lagoon. I think there's a concern that 30007.5 is a Pandora's Box, and yet on the other hand it was put in the statute to provide flexibility. In order to really maintain the Commission's long-term use of 30007.5 and these large-scale planning activities, one of the areas at least that might be useful for discussion, is whether or not providing some criteria in 30007.5 would be beneficial to put some parameters.

There are principles of conservation biology. For instance, in the NCCP guidelines that were used for the San Diego MSCP program and the endangered species programs that are generally accepted principles of conservation biology that might be fruitful to look at. I think that certainly reading the court's decision, I think I would read into it a concern that the language and the statute may be too sweeping. There aren't enough safeguards, and that's just my interpretation of between the lines.

That could be coupled with a provision that is in the Act right now, which is 30335.5, and I hate to throw all these numbers out but that's where it is, which does allow the Commission to create scientific panels to provide advice to the Commission. And again, the analogy I think is with the endangered species programs where there was a scientific review panel that I think gave people the sense of the parameters of this. There is a major problem in terms of the Commission's historic practice with respect to linear facilities such as bridges and roads. Bridges by definition have to cross rivers and streams. If they're crossing big rivers, it's really hard to build them without pilings.

The court basically said you can't even expand existing facilities if they're not enumerated much less build anything new. In the past the Commission has approved major projects, including a major interstate widening in San Diego County, under its previous interpretations. I think it's a serious question that we're facing and I'm not sure that the court played that one through but that's what it said. Then there's just a sort of day minimal small scale implications

of areas that are technically wetland but are not really connected with anything, and where it's very hard to do any kind of project planning if you kind of sidestep around all these little pieces.

So I guess my conclusion is that when we drafted the local coastal program provisions of the Coastal Act, and I did have a major hand in that with Dave Beatty from the --- Cities, that the concept was to move away from project-by-project planning to larger scale planning. To be able to look at habitat systems, look at what made more sense on a long-term basis. My belief in that, and it's confirmed both by I think the results of a lot of LCPs, not all of them have been wonderful but some of them have done a pretty good job.

Also the work that I've done on the endangered species programs in San Diego and Orange County. With that I'd like to conclude that I think there are some significant implications of this decision that really reverberate throughout not just individual permit planning but the larger scale at local coastal program and master plans.

Peter Douglas, Executive Director, California Coastal Commission:

Thank you. Let me just, again, remind you that Jamie Jordan-Patterson who is our attorney from the Attorney General's office who dealt with this case, defended it, and then dealt with the settlement and is guiding the Commission now in terms of how we apply it is here with us and I think she knows more about this case than anyone else in the world. I can also say I've known Bill long enough to know that this isn't the last time I'm going to disagree with him. I think that his characterization of the implications of the decision remind me of a whole host of other misconceptions about this decision. For example, in the letter that I got inviting me to this meeting it seems to suggest that the decision prohibited the construction or expansion of any road, bed or bridge within coastal wetlands. The decision does no such thing. That development within any environmentally-sensitive habitat area is prohibited. The decision does no such thing. That fill of coastal wetland in connection with restoration of degraded wetlands is prohibited. The decision does not do that. I think it's important to understand and keep in perspective what in fact it does.

It doesn't do anything that's dramatically new and different. What it did was reject the Commission's decision in the Bolsa Chica case because the Commission went too far and did not make the findings necessary to support its decision. That was at the nub of it. The Coastal Commission's position is that it can, that it will and it has worked with the decision and does not take issue with the court's ruling. The Coastal Commission also takes the position that no amendments to the Coastal Act are needed relative to this decision. We continue to have the discretion to deal with issues, projects that come before the Commission within the context of this decision.

For example, as Bill said, that the decision seems to suggest that anything that isn't specifically permitted in the Coastal Act in a wetland can't be permitted. That's simply not true. The Commission has dealt with situations like this in the last few months, last six months. For example, in the Eel River Delta dealing with a barn that would take cows out of wetlands and as a result improve water quality, the Commission approved that barn even though it's not a specifically permitted use in a wetland because it found that there was a specific conflict, a direct conflict, between the policy that protects wetlands and the policy that calls for the protection of water quality and endangered species.

The court said that when you have a direct conflict between specific policies like that, the Commission can balance and come out with a result that is on balance most environmentally protective. It also did that in a light rail case, again contrary to what some people think, here in San Diego which was an expansion of transportation capacity. It was a light rail project in San Diego that required the placement of piers in wetlands. The Commission found that, yes, that was contrary, that was not a permitted use under this decision. But because it promoted public access, because it was mass transit, because it protected air quality, that there was a direct conflict between these policies and it made a decision which on balance was most protective of the environment and approved the project.

So the Commission still has the discre...and we've done that in other cases as well. So the Commission still has the discretion to look at these specific cases on a case-by-case basis. We have not yet found a single case that we haven't been able to deal with and address because of the Bolsa Chica decision. So I think it would really be ill-advised to use the Bolsa Chica decision as an excuse or a way to weaken the California Coastal Act. I think that's all

I have to say at this point, and then be prepared to answer any questions. If Ralph has anything to add then add. Ralph is our Chief Counsel.

Assemblywoman Ducheny:

Let me just for clarification's sake, let's just sort of engage in this for a second. It was my understanding that there were guidelines that the Coastal Commission used to make the Bolsa Chica decision that, I mean the original Bolsa Chica decision. I think what I have heard from folks who may have future developments that may come before the Commission, the somehow those guidelines, which are things that people sort of had, okay, like what test do I have to meet, that those may not be being implemented or not be allowed to be anymore because of this decision. Is there...let's talk about the guidelines for a minute just so I understand it.

Peter Douglas:

Well, first of all, the court said very clearly the statute prevails. If there's a conflict between the guidelines and the statute, it's the law that prevails and that's the statute. I think the guidelines that are being talked about were really kind of very specific relative to Bolsa Chica. That goes back to when the Coastal Act was first crafted, and there were plans to build a Marina. There were plans, ways, there were proposals to develop in that wetland that would be difficult if you just applied the Coastal Act policies. So the guidelines were crafted, in part, to find a way to maybe deal with that in conjunction with a boating facility that could be allowed there, and also allow some disruption of the wetland functions.

We have not used those guidelines, certainly not after the court decision and even before because there are very few circumstances in which that applies to. I can't even remember...

Assemblywoman Ducheny:

These are special guidelines? What I always thought of Coastal Commission guidelines. I mean there's a whole body of administrative law, as it were, that I remember looking at years ago that were the sort of administrative side of the Coastal Act. Of saying, okay, we got the Coastal Act but the guidelines are used and cited repeatedly in CEQA actions all over the place, and so those are the guidelines I'm talking about. Now if you had special guidelines for the thing, what I'm talking about are what I would refer to as the Coastal Commission guidelines which have been around for 20 years which were the things that were the administrative implementation, as it were, of the Coastal Act.

Peter Douglas:

Let me ask Mr. Faust to respond to that.

Ralph Faust, Chief Counsel, California Coastal Commission:

Just to clarify for the audience, these are not the guidelines that are the CEQA guidelines, the resources agency regulations. These are rather the Coastal Commission's interpretive guidelines. They were, as the assemblywoman indicates, drafted initially to give guidance to local governments and to the regional commissions back in the very early days of the Coastal Commission. They contain a number of different provisions on a number of different subjects, and several of those were at issue in the Bolsa Chica litigation. One of those that Mr. Boyd mentioned had to do with the circumstances, if any, under which residential development could be approved in wetlands.

What Mr. Douglas was referring to was that that's very limited because the only thing that it could even arguably apply to are those wetlands that have been declared to be degraded by the Department of Fish and Game, and that's a limited universe that, in fact, doesn't exist anymore. There are no other examples that we're going to be facing of wetlands that fit into that category. But there are other kinds of interpretive guidelines...

Assemblywoman Ducheny:

Does that mean we've fixed them all or we just don't have any left?

Ralph Faust:

It means the latter rather than the former although some have been fixed. Some have been purchased by the...

Assemblywoman Ducheny:

So there's no degraded wetlands left?

Ralph Faust:

Not within this category of having been declared so by the Department of Fish and Game, that's correct. There are other provisions of the guidelines that were, for example, also at issue in the Bolsa Chica case and that the court upheld. For example, the issue of whether or not there could be road expansion. The court looked at the Commission's interpretive guidelines and followed it so that those guidelines should be followed. So it's not correct really to say guidelines is any one unitary thing. They provide a number of different things and generally the courts have looked at them with deference as I think they generally did in the Bolsa Chica decision. Though in the one particular instance having to do with the possible approval of residential development they did not go along with the Commission's interpretation of those guidelines.

Assemblywoman Ducheny:

Jamie did you...you looked like you're wanting to get up and say something. You're welcome to...

Jamie Jordan Patterson, Deputy Attorney General, State of California:

Yeah, I would just like to say that that's accurate. They guidelines in question coupled two particular code sections together. They coupled 30233, which is the allowable uses in wetlands, with 30411, which is a provision that allows Fish & Game to study degraded wetlands and determine whether or not a boating facility is appropriate. If not, whether a less-intrusive use could be allowed. The Commission had interpreted that particular code section as allowing certain other uses than boating facilities.

Last on the list of three or four items were residential uses, and the trial court and the court of appeal both found that the residential uses could not be less-intrusive than a boating facility. Therefore the Commission had gone beyond its purview in adopting that particular guidelines. The other guidelines, as Mr. Faust mentioned, regarding allowable uses and the expansion of roadways were found by the court of appeal to be acceptable.

Assemblywoman Ducheny:

So we have a divergence of opinions. That's not unusual and that's what we're here is to sort of just sort of hear it out and see, and I know Larry has got one to say and Ned may too. Yeah, okay. Go ahead, Larry.

Larry Silver, Attorney:

I have prepared a statement which I think segues rather well into what the Coastal Commission was just indicating, and which also, I think, indicates that at least I have a very different interpretation of the opinion from what has been advanced by Mr. Boyd. I was seriously concerned, in terms of the invitation, about how the Bolsa Chica decision was characterized and so I spent some time in this statement basically trying also to indicate how I think the Bolsa Chica opinion should be read. I think, in fact, it's the way it ought to be read.

Now, the decision is first described in the invitation as prohibiting the construction or expansion of any road, bed or bridge within a coastal wetland. As pointed out, but I want to reenforce, the court approved that portion of the Commission's guidelines that allows limited expansion of roads, beds and bridges necessary to maintain existing traffic capacity. As the court stated, roadway expansions are permitted when expansion is necessary to maintain existing traffic capacity. The problem in Bolsa Chica was that the road was designed as well to accommodate the extensive development on the mesa that was being contemplated with respect to the Bolsa Chica project.

Assemblywoman Ducheny:

Hold on. Let's just stop there for a second. If we have the example that was mentioned, I think it was sort of mentioned earlier, the obvious one here would be I-5 near the Del Mar fairgrounds, Mr. Fair Board chairman. I-5 crosses the San ---, whatever it's called...Lagoon, up there. Now if, for whatever reason, or that or the trolley or the Amtrak figures out that it needs to expand in some fashion, is that the kind of thing that everybody would agree is potentially...I'm not asking for pre-advanced decisions about things but are those the kinds of things that would be presumed to be potentially possible given all the other factors that you would have to consider?

Because you would be expanding something existing as opposed to something that might have to go on down Imperial or San Diego, --- or Chula Vista with respect to the developments that are proposed down there where you might actually have to...I hate to use you as a scapegoat, Bill. But if we have to build some kind of road that works into the development that's been proposed in Chula Vista for near the Nature Center to go with the hotel and all this sort of stuff. Is that the kind of thing on the other hand because there isn't already a hotel even though it was planned and all those sort of things a 100 years ago that might not be? (---inaudible---) per se to be not consi..available for discussion.

Ralph Faust:

I disagree with Larry on the facts and what the court said. The LCP findings specifically said that the widening of Warner Avenue was to accommodate future regional traffic, was not need for the project. The court said the Commission found the widening needed to accommodate future traffic created by local and regional development in the area. The court rejected the notion that you could expand a road to maintain the level of service, and that's the concern I have with the language of the opinion.

Assemblywoman Ducheny:

I'm just trying to get us to flush it out a little bit.

Ralph Faust:

Well I'm not quite sure what the question is, and maybe we need some help from the Commission. I think that there will, to the extent that filling, dredging, diking or whatever would be needed in wetlands to accommodate essentially new roads and new bridges. I think there's a problem.

Assemblywoman Ducheny:

But new roads and bridges even if they're new in the sense only that they're expanding existing?

Ralph Faust:

With regard to a facility that's being reconstructed or modified in some way to accommodate existing traffic that still would require dredging and filling, I think that could well be accommodated within the existing purview of the Act.

Assemblywoman Ducheny:

That's the question I guess.

Peter Douglas:

What we're doing is looking at that decision and recognizing that what it basically said is if there's an expansion of capacity, that is, you're not just meeting existing capacity for traffic, for example, as we did on the light rail project. That obviously was intended to deal with new traffic, expanded traffic. Then what we said was, alright, we have to look at the project to see whether or not it's promoting some other Coastal Act policy or goal, specifically, in set forth in chapter 3. If it does, then we can balance the provision for the protection of wetlands and the provision to promote these other goals, and the Commission can balance the two. We have one right now with I-56, for example, I think it's I-56, Route 56, where it is an expansion of capacity.

Assemblywoman Ducheny:

That's the Poway one?

Female Voice:

Carmel Valley.

Assemblywoman Ducheny:

Carmel Valley, oh yeah, I forgot.

Female Voice:

Where it meets 5.

Peter Douglas:

Right, and what we have told the proponents of the project, because it will go into environmentally-sensitive area, is that you have to build into the project some component, some beneficial component that promotes another specific Coastal Act policy. For example, protecting water quality. So if you can show that you have in this project facilities or features built into it that promote or protect water quality, that will allow us to balance that particular benefit of this project against the policy of putting some fill into ESHA. We think that that allows the Commission to approve the expansion of this roadway. And mind you this, again, is simply in the coastal zone in those areas where the Commission does have jurisdiction. So we feel that we haven't found one yet that we haven't been able to deal with. It does mean that they have to build into their project some benefits that promote another specific Coastal Act policy. We don't think that that's wrong...

(End of Side 1)

(Begin Side 2)

Peter Douglas:

...so the Commission isn't blind to that. It's just what I was saying is that we have to look at the resource as it exists on the ground and if it fits the definition ESHA under the Coastal Act, then we have to protect it.

Assemblywoman Duchenv:

Pat has a question.

Patricia Bates, Assemblywoman, 73rd District:

I'm curious as to where the property owner goes to begin that definition process if he finds that on his property and wishes to build on it, and it is an ESHA and it's not degraded. Aren't we saying that, then, he can't build because you can't remove it?

Peter Douglas:

No. There are a variety of things that can be done. Once a property owner wants to go forward with a development and they think they might have some ESHA on their property, they can talk to us, we can look at it if it's in the coastal zone and if we have jurisdiction and the local government doesn't, we can look at it and we can tell them if we think that, in fact, it is ESHA. Then we can suggest that the development be sighted in such a way the it leaves the ESHA alone, and we're dealing with that all the time. If the entire sight is environmentally-sensitive habitat and no economically viable development can proceed without destroying some ESHA, then we have a provision which says that the Coastal Commission cannot take private property without due compensation or contrary to constitutional protections, which is an override provision of the ESHA protection provision.

We've done that in the Pygmy Forest, for example, where property owners have come in. The entire parcel was ESHA but the Commission used that section to allow an economically viable use. It made it small and put it in a particular location where it would do the least damage but it was allowed to proceed, so there is a protection for the property owner if the entire property is ESHA and you can't locate the development in another place.

Patricia Bates:

I heard another person comment on that, the decision actually directs it to the local coastal plan rather than through the Commission decision. So doesn't the developer or property owner have to go back to the local government?

Assemblywoman Duchenv:

And do the same guidelines apply to them would be...

Patricia Bates:

Yeah, that's where I think the developer or the property owner starts getting caught in the middle of two agencies with perhaps conflicting guidelines if that would be the case.

Peter Douglas:

I don't think so. If the local coastal program in the coastal zone, which is what the Coastal Act calls for, has been certified as completed then, yes, the property owner goes to the local government and works with them on a development proposal. But if it's, for example, in an area that appealable to the Coastal Commission, we advise that the property owner and the local government talk with our staff so that we're on the same page and can help the property owner construct or plan a project that, if it is appealed to the Commission, has already addressed the issue of ESHA. But you're right, if there is a local coastal program that's already been approved the property owner has to start with the local government.

Assemblywoman Duchenv:

Ned, did you...

Ned Washburn:

I, perhaps, have a different view. There is a problem, I think just listening to the discussion and the disagreements and the confusion suggest to me that it's clear there's a problem, and I would suggest that it goes back to 1976 which is the last time that the legislature looked at what the definition of a wetland or an ESHA was. Since that time, just taking the wetlands for example, we have had considerable development of what a wetland is considered to be, particularly in the regulatory sense driven initially by the federal government, EPA and the Corps of Engineers.

We have had no clarification by the state legislature about what a wetland is. I think if you read the wetland definition that was, again, adopted in 1976, you can understand why the exceptions to filling a wetland are so constrained. Because the definition in the code basically fits a title wetland, what we would ordinarily consider to be a marsh, adjacent to a bay where a boating facility makes sense. The problem is that the Coastal Commission through regulation and guidance has taken that definition and gone much further.

As Bill Boyd indicated, has gone well beyond the Corps of Engineers which, in my opinion, has not been restrained in its definition and now considers areas as wetlands that have any one of three possible parameters. So we now have areas being classified as wetlands that are nowhere near a title water body. They can be isolated, they can be degraded, they can be created by unnatural means, and I have a couple of examples...

Assemblywoman Ducheny:

We've got one right here in San Diego. Where's McMillan, man? Anybody from Chula Vista?

Ned Washburn:

So you now have a very broad definition of wetlands but you have a very constrained statutory exception to what you can do with these wetlands. I think the problem is that the legislature needs to take a look at both sides of the equation. One, what is this resource that we are choosing to regulate? And define specifically what it is because I think there is a political decision involved in deciding what a wetland is, given the kinds of restrictions that flow from that classification. And the same is true with an ESHA. Again, that definition goes back to 1976 and hasn't been altered.

Both of these have been refined, defined and expanded by the Commission in a regulatory or guidance way without any involvement by the legislature. We now have a situation such as Bolsa Chica which is the result of that. You have an ever-expanding definition with these constraints and the Commission all of a sudden finds itself in this terrible bind with a dying eucalyptus grove as an ESHA. Wetlands that are necessary for transportation corridors and it tries to fashion a reasonable solution. The court then looks at the statute and says, well, it may be reasonable but it doesn't comply with the statute, and the court may be right.

The problem really goes back to how the statute reads, and I think that the legislature needs to take a look at these definition of a wetland, a definition of an ESHA, and take a look at what are the circumstances under which an exception to prohibitions can be addressed and allowed and what kind of mitigation, relocation and so forth would be permissible. These are important decisions and they're ones that have not been addressed by the legislature. They've been an ad-hoc progression of choices made by the Commission staff and the Commission.

Two brief examples: In San Mateo County, this happens to deal with a wetland and keep in mind that most wetlands are also considered ESHAs so you have this double overlay of prohibition. One is an area that has been classified as a wetland. It was never a natural wetland but it became inundated from drainage runoff from a nursery across the way, which led to certain saturated soil conditions on a temporary basis. The Corps of Engineers took a look at it and said, it's not a wetland under our definition, the development can go forward. The Coastal Commission said, oh ho, no. Under our definition it is and because it is there can be no development. We don't care that if the irrigation stops, the wetland doesn't exist.

Second example: A parcel that the Corps of Engineers disclaimed jurisdiction over. The wetland was created after development began and there was grading, there was then a sewer moratorium which stopped the development for a while. One of the City's drainage facility overflowed, water got into the depressions created for the streets, they became wet and saturated. The land owner went out and tried to remedy the situation and was issued a cease and desist order by the Coastal Commission on the grounds that this is now a wetland and nothing can happen in wetlands.

Now this is not an exhaustive list but it is an example that there is a serious problem and one that I would suggest is not well-served by trying to dance on the top of a pin and strain these definitions, as we have been doing, to try and make sense out of a regulatory program. I think that it really ought to be faced head on and say, there is a problem, let's deal with it. It doesn't mean abandon wetland regulation or abandon sensitive areas but it does mean taking a look at it and bringing sense to the situations, both in terms of what the legislature chooses to regulate and what are going to be the exceptions to stringent regulation.

Assemblywoman Ducheny:

And as we go through this, what I would be concerned about also is the public, whomever, land owner or not-yet land owner or whatever, having some sense of where they can go and not go. I guess it goes back to my sense of NCCPs but it's a question of people having enough notice to not invest a whole lot of time and money doing something that is way out of line and, Bill, yeah, speaking of such people. Anybody who's speaking there, just state your name. Actually you should probably...

William Tuscher Development Enterprises:

My name's William Tuscher, and my company's Tuscher Development Enterprises and we're developing a large-scale, mixed-use project on San Diego Bay. It's actually the only fee-owned piece of property on San Diego Bay, and within the jurisdiction of Chula Vista. I just wanted to say a couple things. First of all, we have been in discussion for over a year with a group that we affectionately call EGAD, that's environmental groups advising and discussing, and we have had more fun and learned more about environmental issues than any project we've been involved with, and we've done 37 master planned communities.

We reversed the development process on this particular project. We're adjacent to the National Wildlife Refuge at Sweetwater Marsh. We have no habitat on our property, per se, but we're surrounded by very important resources. All that being said, I don't want to mislead anyone, we're very candid about who we are and very focused on our goals and objectives which are purely economic. We do, however, believe that by enhancing the habitat in the area and by respecting the resources, that we can actually enhance our economics and benefit our project.

Resultingly we have spent a good deal of time discussing project-specific details with National Fish & Wildlife and Friends of South Bay Wildlife, which is a banner under which there are 16 groups, to try and incorporate every possible manner in which to protect the resources surrounding our project. The challenges that we have, in regard to the discussion today and I'll throw out a very specific, Marina Parkway, which is a road that exists. It severs good continuity between San Diego Bay and a property controlled by National Fish & Wildlife called the F & G Street Marsh. It's a isolated marsh with little, I think, viability long term.

We've been asked by the environmental groups and conservation groups to build a bridge to enhance the flushing and the connection to the bay. It's about a half-a-million-dollar investment. We're committed to do it but it means that we're building a road. We're expanding a road and we think it's important to do because we want the amenity that is this open space and wonderfulness that is the resource for a benefit to the community. So specifically this ruling has us scratching our head as to whether we'll actually be able to do the right thing that we've been asked to do. So that's, I guess, one comment.

Secondly, I want to echo what was just said and that was regarding the ambiguity. We've spent a year not processing a project. I want to emphasize this. We're millions of dollars into this thing and we haven't submitted to the City for approvals. We have an existing LCP with a development envelope the size of Texas, 4.9 million square feet, and we're significantly down-zoning the property and reducing the overall scale. We spent the time because the project's going to be better and we'll have the endorsement, we hope, of some very important people in the environmental community.

But the ambiguity is very, very dangerous to all concerned, and that includes not only our economic interests but certainly the habitat groups and the benefits that National Fish & Wildlife and the local groups will see from our effort to enhance the refuge and the surrounding sensitive resources.

Assemblywoman Duchenv:

Now I think that's part of what we're looking for is some of these kind of concrete examples that allow us to see where there are issues. I appreciate that, to just see what kinds of situations we're looking at because we're kind of hearing, well we think it's ambiguous and we don't think it's ambiguous. I think if, in fact, it was easy enough to say, we know exactly where we're going, we probably wouldn't be here.

Male Voice:

Could I ask, in terms of focusing in on that example, I'm not asking Peter to render an opinion on this situation.

Peter Douglas:

It's be okay, actually.

Assemblywoman Duchenv:

Yeah, yeah. He'll take that into his EGAD group and...

Male Voice:

I wonder if Peter and Jamie and Ralph could tell us, I know the situation with the barn up north and the Bolsa Chica decision the court said, if you're choosing between fish and fowl you can use balancing. You sighted the light rail project. The part of the opinion that has given everybody pause, and I think if what you're saying flies with the courts then you can that the balancing provision still exists. But the court said practicality as well as a need to maintain a consistent level of wetland protection suggests that development of wetland ESHAs is governed by the very specific and uniform limitations set forth in Section 30233, Subdivision A, rather than by way of the essentially ad-hoc balancing process permitted by 30007.5.

That's the part of the opinion that having seen the court's application in this specific situation and that language that that's the part that we're having trouble with. You clearly did do a balancing, I guess, with the light rail project and maybe, Peter, you or Ralph or Jamie could explain how that gets --- so we could just focus in on where the problems are.

Ralph Faust (??):

If I might I think that the language there really deals with a very narrow part of that decision. It deals with the court struggling to determine whether residential development was approveable in the wetlands. They found that residential development was not one of the specific enumerated uses in 30233 and that, as a legal principle, that the specific of Section 30233 governs over the general of Section 30240.

Bill Boyd:

This was the part of the opinion that dealt with the widening of Warner Avenue into the pond area.

Ralph Faust:

Then I disagree completely. Let me go to that. I thought you were talking about the part about residential development where there is some question about what the Commission was doing. But with regard to the issue of using the balancing provisions with respect to the widening of the road, the court didn't say that you couldn't do it. The court said that the Commission didn't provide a basis for doing it.

Peter Douglas:

And I think the gentleman from Chula Vista, I don't know if he's talked to our staff, but if he characterized it correctly I'm not sure that that's not going to be something that we can find consistent with the Coastal Act if it is in fact going to be a restoration and enhancement of the resource that's there. So from my perspective, all I'm urging is that, yes, there are some ambiguities and there is some uncertainty but that's the nature of the world we live in. You can't have exactitude on everything at this point.

As long as you have a process to get to a solution that balances both private property rights and interests, economic development interests, and the environmental interests that the public has. I think that we have that ability. For example, the clients that Ed represents or the cases he represented, I think those are situations that if you look at the facts they may be a little bit different. When you look at the resources that are on the ground, and it may not preclude development, it may just have to be done a little differently.

Assemblywoman Ducheny:

Let me turn this around then. I'm going to try this on the environmental lawyers. If the Coastal Commission were to, in any number of these kinds of cases, exercise that discretion, would folks contemplate suing the Coastal Commission for not complying with the language that Bill just read because they exercised their discretion as balancing. Would that logically, as you read the decision, make a case against the Coastal Commission if they were to in fact apply that discretionary balance that Peter's suggesting to the kinds of situations we're discussing.

Anybody want to try that one? I think that's part of the...what everybody fears is all the different kinds of litigation. So the one side is, you're taking away my ability to do something the way I think it ought to be done. The other side to that would be, okay, if in fact the Coastal Commission, that language does not mean that the Coastal Commission does not have the ability to do the balancing. If it doesn't mean that, then that means that folks can't sue based on the theory that it does mean that. Joan.

Joan Jackson, League for Coastal Protection and California Environmental Law Project:

Well, as a client of an environmental attorney, let me say that there have been occasions in which organizations to which I have belonged have sued because they felt that the Commission had not acted properly. However, I can tell you that in every single case they were settled by appropriate mitigation for the damage being done.

Assemblywoman Ducheny:

The issue that at least some folks, and we probably need to hear from a few more of these just so we kind of get an idea of what the examples are of the kinds of cases that can up under this. I think the issue that came up because of the way the Bolsa Chica was ---. You've got a dying eucalyptus grove and the proposed mitigation is to replace that with a better one that will be alive. So now we have, you don't develop because you're going to leave the dead one in place, so it just dies and nothing happens out there and there's nobody that has the economic incentive to cure it.

So we're going to get more degraded wetlands or more unprotected, unrestored ESHAs. That would be one of my overriding concerns would be that you get into a situation where there are no incentives to do the bridge that Mr. Tuscher wants to do or the replacement. I mean SDGE, I mean I don't think this effects their thing, I don't even want to go there. But I think that's an example, though, of where we've ordered somebody to do mitigation on wetlands and are we going to get ourselves into a situation if we don't better define this where those mitigations can't happen. Therefore we don't really save the wetlands we just protect them from changing which may not, in fact, be of assistance to them. Go Bill.

Bill Craven (Sierra Club)

With your permission, can I disagree with one of your assumptions?

Assemblywoman Ducheny:

Sure.

Bill Craven:

The trial court in this case ruled that the developer could move the habitat, if you will. What we've got is eucalyptus trees that are going to be replaced with poles in the ground. There was a sense that maybe poles in the ground wouldn't be quite as attractive to the raptors as the eucalyptus trees. I would agree with the hawks. The second thing is, is that on appeal the court said that for this kind of mitigation to occur, any kind of mitigation to occur in one of these sensitive areas, that the mitigation itself or the habitat destruction, is also advancing one of the purposes protected by the Act. Not just the economic potential or the economic rewards sought by the developer. So that's not a revolutionary decision. That is, as the court said, implementing the plain meaning of what the legislature intended in the Coastal Act.

Darlene Shelley:

My name is Darlene Shelley and I want to say to Bill that I believe you completely misrepresented what was going to be done for replacement of the ESHA. That ESHA was going to be replaced with 20 acres of trees. The poles and the nesting boxes were just to assist things while the trees were growing. In fact, in 1981 that ESHA that everyone's so concerned about was better than 20 acres. By 1994 that ESHA had shrunk to less than six acres. It will continue to shrink because the trees are dying and the trees are dying due to salt water intrusion. So I really don't see how leaving that ESHA in place saves it because eventually it's just all going to die out and it's going to be an eyesore. Now maybe, as Mr. Douglas said, the Commission didn't go far enough in its findings, and maybe that was the problem.

Assemblywoman Ducheny:

Yeah, bad facts make bad Law

Darlene Shelley:

That may be true. But to me the bigger issue was brought up by Mr. Washburn and that is, there is no real concrete definition for wetlands or ESHAs in the Coastal Act and there should be. At least we'd have that much knowledge when we're dealing with the federal government. It would be nice to have that much knowledge. We have a manual and supposedly they're supposed to follow it. But we don't even have that, I mean periodically inundated or you have vegetation. That's just not enough. You can periodically inundate a parking lot. So I think we really need a much better definition of what a wetland is and what an ESHA is.

When an ESHA is declining like that, so severely, maybe the applicant, and hindsight's always better, should have gone in and said, you know, this isn't really an ESHA anymore. These aren't even native trees. At least the proposal was to increase the --- over its existing and plant native trees. In the court decision is what the court decision is and if the findings didn't go far enough then that's another decision and maybe the applicant needs to go back and reexamine what they want to submit this time. I still think the bigger definition is with Mr. Washburn.

Assemblywoman Ducheny:

Okay, we're getting some interest here. This is good. Alright, let me take one more from out there because I've had somebody else with his hand up for a while. Then we'll go to Bill and then Larry and I think Matt wants to talk, too, so. And Peter has his up. Sorry. Alright, one more.

Rod Mead:

My name is Rod Mead and I think what I'd like to talk to you about a little bit is from two perspectives. Number one, I was the Commission's representative in Sacramento when the bill was drafted in '76. I worked through the 0007.5 language. The other perspective is, I've also been the project manager on the consulting side for both of the NCCP programs that were done in Orange County. The one that was approved in '96 for Central Coastal, the one that we're working on now for Southern. We're also working on subarea management plans, which will deal with the 404 wetlands on a sub-regional basis.

I guess the concern I have with the recent court language and with the initial responses we've gotten from staff so far in terms of what this means. My business now really focuses on creating large-scale habitat reserve systems that are going to address both uplands and wetlands, working under both the state and federal ESAs, the stream bed alteration agreement, and the --- 404 permits on a sub-regional basis. So what we're doing is putting together sub-regional conservation strategies. Now, given that, I see already the situation where, given the ESHA definition and given the fact that we have already identified and designated ESHAs in certain areas.

We're talking about ESHA definitions that are going to be subject to this court ruling that are going to be in areas that where, for purposes of really seeing to the long-term conservation and management of sensitive habitat resources of wetlands with specific hydrologic value as well as biologic value. We're going to have the ESHAs being used by the courts or by appellates as reasons to effectively block the conversion of or impacts to specific upland habitats and wetland habitats that are the foundation of an overall strategy that allows us to put together a large habitat reserve system that's adaptively managed, that's funded, and that can be working on a long-term basis over a wide area.

So I think one of the questions I have for the panel and one of the suggestions I would have for you, is to begin thinking about how we're going to implement these state and federal programs which go both inside and outside the coastal zone within the construct of the language in 0007.5 that talks about protecting the overall quality of the coastal zone environment, and recognizing that the coastal zone environment doesn't mark the end of the earth. That it's part of an overall system that has to be conserved and managed over the long-term as a complete system not just as a strip of land close to the coast.

Assemblywoman Ducheny:

I've got an order here and I'll go down it. Peter, did you still want to make a comment? Then Bill, Larry, Matt and Scott.

Peter Douglas:

Real quick. The question you asked about whether or not we'd be sued by the environmental community. I suspect that the commission from time to time will make decisions that will be sued over by the environmental community as we were on Bodaquitos Lagoon, for example.

The restoration. But again, if the Commission makes the findings as it did in that case where it was restoration of habitat for primarily aquatic species, even though there were impacts on bird life, the court said that the balancing that the Commission did there was appropriate and upheld the decision. I think that the lack of adequate findings in terms of how the ESHA was dealt with on the Bolsa Chica Mesa, that was the major problem there. I think it's a matter of if the Commission, as Bill said, if the project builds into it and deals with converting an ESHA benefits that go above and beyond simply mitigating for that particular impact. There's no question that I think we can deal with that.

Assemblywoman Ducheny:

That language doesn't preclude you from...

Peter Douglas:

No. I think we can work with that and, as Rod says, if there is a problem with an overall project that goes beyond the coastal zone, we're prepared to deal with that. I don't know that there's a problem that we can't resolve and I guess what I'm saying is that I don't see, at this point, problems that require a legislative solution.

Assemblywoman Ducheny:

Well, long-term, I think there's a big question about, we're back to the same thing we do in ag, about harmonizing with the feds. But I don't know how we get to the stage where people don't have 40 different definitions to deal with and try to meet. The problem, I made a couple of references to this so I might as well say it. For those of you who aren't from South San Diego, the issue that we've sort of made references to was a U.S. Army Corps finding that a depression that two years after the EIR was completed, suddenly was declared a wetland to stop a major roadway going to the Olympic Training Center in the middle of a development that has been in the planning and has been through all of the things.

Two years ago they completed the EIR. There was no wetland. Then suddenly this year, two years later, the Army Corps said, oops, it's a wetland because it had rained, and it was sort of the example of somebody else. It rained one day and the ditch became a wetland. So those kinds of things. But that was a federal definition, it wasn't the state wasn't the problem in that one, it was the feds. It goes back and forth and at some point I can appreciate the frustration that people must feel in trying to plan something, whether it's a local government planning or a developer planning. But if somebody's trying to plan something and not being able to decide what rules it's planning under. I think that's the sort of frustration we're hearing that may be some way to get at. Bill.

Bill Boyd:

The Commission would never do anything like that, right?

Assemblywoman Ducheny:

The Commission wouldn't do that. It wasn't your fault. Just getting you off the hook on that one. It was an inland, it wasn't anywhere near the coast. That was one of the problems. It was five miles from the coast and it was a wetland suddenly.

Bill Boyd:

Yeah, I don't know anything at all about this, about that situation. I just wanted to return very briefly to this issue of whether land owners or developers are getting the short end of the stick here because of this court decision based on this issue of lack of flexibility of either the Act or the decision. I just want to make two points. One is the ESHA status itself is not an absolute prohibition against anything. The statute itself says, environmentally-sensitive habitat areas shall be protected against any significant disruption. So in other words, that's the test. It's not no development, period, under any circumstances ever.

The second point is that as the Commission or the LCP proposes what is or what is not an ESHA, that the issue of the viability of that habitat is to be identified at that point and the Act says that, and the court decision says that. It says, when we do not doubt that in deciding whether a particular area is an ESHA within the meaning of 30107.5, the Commission may consider among other things its liability. So, this is an attempt on the part of the legislature to say, when you do this at least have it be based on biological evidence, and I think that's proper.

Matthew Adams, Building Industry Association, San Diego County:

You touched on some of my points earlier where this lack of definition and clarity inevitably leads to regulatory gridlock where you have planners differing with agencies on what is and isn't a wetland. Does it fall under those three criteria. And then as Joan stated earlier, they had sued many times and have settled before going to trial for what she considered appropriate and mitigated standards. But who knows what that truly is under our current situation because it's so convoluted, and without the clarity it's...there comes a time when you have literally millions of dollars on the line for a lot of these projects where you have to start factoring in those type of things such as sub-litigation costs and make a determination at, well, I have to do something so I'll try to settle this so I can get the project moving forward. That's a direct result from the lack of clarity in the definitions on all of these issues.

You have talked about the McMillan property where essentially old dried farmland turned into an aquatic resource of national importance which was a ditch. For the state you have old road ruts are now vernal pools, and you really have to come up with a way to quality definitions and clarity on all of these issues or we're going to continue to have discussions such as these for another 15, 20 years as we have had already.

Assemblywoman Ducheny:

I don't know if we can ever make anything so clear that there wouldn't be some of that but I do think it's important if what happens is somebody sues and you end up in a settlement that mitigates, you ought to be able at some level to be able, up front, to suggest what mitigations or some strategies in the planning that would allow for that mitigation so you didn't have to go to the litigation piece. It's real easy to give folks the opportunity to know that up front and decide whether they're going to go forward or whether it's just not going to be possible before you get into something and then go, oh gosh, how do I fix it? And knowing where not to even deal with it. If there's enough notice and definition to allow people to plan. The planning for local communities is a major concern. Pat. Then we'll just kind of go around Larry and then Scott.

Pat Bates:

I think the discussion that's evolving here goes to the heart of the issue. If we don't have a process that we can rely on that's understandable, that's efficient and fair to both sides, you have a cost that becomes obscene to both the public and the private sector. Having sat on both sides of the table, being a local government defending and being part of a private group as the litigant, it is ridiculous to be hostage to a process among agencies that aren't agreeing. If we have a role to play as the legislature would be to bring that process to some understandable equation so that everybody knows where they have to go first.

The developer, with this decision we now know has to go back to the local community if he's got the situation that matches what set forth in the Bolsa Chica issue and so forth. If we all believe in the process, which I think you brought forward Mr. Douglas, then it is incumbent upon us to make that work or we will have the gridlock and we'll have this exorbitant cost that's stopping the development of housing that's so basic to the economy of the state. Also, it's degrading on the other side the resources because we can't get developers to mitigate for that. Both sides lose tremendously if we don't take the responsibility to make this thing work.

I happen to be involved in my district with a little one where a developer's hostage to a process. Everybody agrees, including the agencies involved, but nobody knows what the fix is so we're kind of struggling with that. Lots of public money down the drain that could be spent on protecting the resources.

Larry Silver:

Well I think in my judgement, the Bolsa Chica decision, and this goes to the third prong of it, does make one thing clear which I think is consistent with the original intent of the Coastal Act. That is that residential development simply cannot take place. It is not an appropriate function of wetlands. It's not coastal-dependent, and the Act contemplates that essentially trading housing on wetlands for restoration of other wetlands is going to result in a loss of wetlands. So, in my opinion, that's another respect in which the Act needs no fixing. It has worked well already to protect one of California's most endangered resources, its few remaining coastal wetlands.

When Section 30233 was enacted in 1976, and this is basically what the court was saying, the legislature made a decision it would not trade wetlands for housing even if that housing approval allowed restoration of degraded wetlands. The legislature wisely saw that given the great development pressures for housing in the coastal zone, such a trade would ultimately result in a net loss of wetlands. There are other ways to restore wetlands. There's mitigation for port expansion that has taken place in California. The Coastal Act affords the Commission discretion to condition development in the coastal zone on wetland restoration then in appropriate cases. Californians are not so bankrupt that they need to trade wetlands for housing in order to restore wetlands somewhere else in the coastal zone. This is the policy choice made by the legislature almost 25 years ago in response to the initiative requiring preparation and enforcement of a plan to protect California's coastal resources.

I think that essentially the court was construing the Coastal Act then properly to impose a constraint. There are other uses that are set out in 30233 that are legitimate uses that are coastal dependent, that allow for diking and filling. But 30233 does not authorize, in fact it prohibits the development of residential housing, a non-coastal dependent use in wetlands that are decreasing and essentially depleted coastal resource. So, at least from my perspective, that's an appropriate decision. There are other mechanisms through governmental agencies as well as other public agencies who are looking for mitigation areas to restore degraded wetlands in the coastal zone.

Assemblywoman Ducheny:

But the issue's going to be in part as I hear it coming is these definitions is what is a wetland and what is a...that's where you get into...I don't think anybody's going to argue that you should...But I could see where in the planning of a housing development that was, let's say, adjacent to a wetland, there would be some parts of the amenities could include access or it could include something else that might impact a wetland in some fashion. It's more on the edges that you get into the problem not on the...

Larry Silver:

Well I think, though, with respect at least to what I've seen in the Hellman and Bolsa Chica cases, I don't think there's really any legitimate dispute concerning whether or not the housing was built on something that had basically the attributes consistent with Corps of Engineers criteria or whatever criteria with...I don't think it came as a shock to the developer that it was building on a wetland.

Many of these wetlands also had been inventoried in various ways by the Department of Fish & Game and were also part of initial inventories that were done in studies that took place in connection with the enactment of the Coastal Act in 1976. But I think there may be some situations but when we're talking about large-scale development projects like Hellman and Bolsa Chica I think for the most part there's agreement about what a wetlands is.

Scott Wetch, California State Building and Construction Trades Council:

Thank you Madam Chair. I don't know if I have much of value to add to the discussion but I feel compelled to make a statement on behalf of the State Building Trades Council. First of all, I'd like to thank you for convening this discussion because I think the need for clarity has been demonstrated here today. If there's anything that's come out of this today it's that the fact that there's some great divergence in opinion on exactly what this decision means, as far as development along the coast. I'd also like to thank you and Assembly member Bates for your willingness to involve yourselves in this PSA, politically-sensitive area.

On behalf of the Building Trades our primary concern is the impact that this decision may have on the development of public infrastructure such as our ports and our airports and our highway systems and our bridges. Not only because of the fact that obviously those are prime sources of employment for our members throughout the state, but those are also the sorts of projects that are really the catalyst for growth in the California economy, and are going to be key to maintaining the sort of growth that we've enjoyed the last several years here in the state.

In addition to that, while we're enjoying really an unprecedented boom and boom in construction in this state, at least in recent years, that's not necessarily the case outside of our urban centers. It's not going to continue forever, particularly in the central coast and in the far north coast, some of these infrastructure projects seldom, and as few as they are, really are the providers of jobs for our members and for a lot of other people along those population areas that they depend on year in and year out to put food on the table and to keep the families going.

I'm not an expert on environmental law and I'm certainly not an expert on this decision but Mr. Silver's clarification that this decision allows for limited expansion of roadbeds and bridges necessary to maintain existing traffic capacity does not give me cause to celebrate and it doesn't give me great comfort either given the growth that California's going to experience in the next 10 years, and growth that continually tends to move towards the coast. We believe, the State Building and Construction Trades Council, that we need to balance the community and the environmental needs and although we certainly didn't always agree with decisions of the Coastal Commission, we felt that the law, as it stood prior to this decision, provided the necessary flexibility and discretion for the Coastal Commission.

(End of Side 2)

(Begin Tape 2)

Laura Eisenberg:

Mr. Douglas has discuss that the Bolsa Chica case doesn't affect that then perhaps we don't have anything to worry about. But to the extent that it does affect the use of that balancing act we are concerned. I would like to point out that the use of the balancing act in the case of the San Joaquin Hills transportation corridor did produce some very good results. I've got a couple of pictures to show you in case none of you have been there lately.

This is the 2.4-acre saltwater marsh that was required as mitigation for this project. We have over 47 species of birds, including the endangered --- tern using this sight now so there is some benefits. This is Benita Channel. This was a 21-acre wetlands sight that was created in conjunction with construction of the corridor. We have actual mountain lions using this now. It's a very successful sight. Additionally, I also want to show you a picture of Cody Canyon. This is the large-scale coastal sage scrub mitigation sight that was done for the project. Also, for the benefit of the endangered species, the California gnat catcher. This year alone we had 40 chicks hatched on this sight.

So I think it's perhaps easy to forget in the fray that there will be positive results that do occur when you do balance land-use and environmental concerns. You'll probably recall that the construction of the San Joaquin Hills transportation corridor was a very contentious project. It was litigated extensively, but for the issuance of that coastal development permit and the application of that balancing finding, you wouldn't have 40 additional gnat catchers, lease terns, and 21 acres of wetlands that we hope in the next year or so is going to provide homes for the (---inaudible---Assemblywoman Ducheny: Pat remembers that one.

Patricia Bates: I was on that board.

Assemblywoman Ducheny: Let's see, Art and then Kevin.

Art Lujan, San Diego Building & Construction Trades Council:

Thank you. I'm going to try and put a local spin to my comments. I, like Scott, am not an expert in environmental law, I'm not very familiar with this particular decision, but what I would like to address is the issue from a common citizen's perspective. Just yesterday SANDAG released the reports on the amount of growth that's going to take place in the region over the next 20 years or so, the projects that are going to be necessary to accommodate the growth for the region over the next 20 years. Now, I don't think from a common person's perspective we have the time to debate the judicial theory of what this decision means or doesn't mean.

I want to know, or I want to be guaranteed, that when it's time to expand and enhance Highway 5 from the Mexican border to the Orange County border, that we are going to have the ability to do that. That when it comes time to expand and enhance the Port of San Diego so that we can accommodate the overflow from Long Beach, and it doesn't end up going to Encinitas.

That we have the ability to put in the infrastructure, the rail systems that are going to be necessary that, quite frankly, will probably go in over wetlands, that we have the ability to expand no matter what type of a runway you put in at Lindbergh, that we will have the ability to do what's necessary for the region. I want to be able to tell the citizens of San Diego that they're going to be able to get back and forth from work in a semi-timely fashion because we have the ability to expand the infrastructure that's so necessary, and 5 is absolutely crucial to the region not only from an economic standpoint but from a transportation standpoint.

That we're going to be able to expand and enhance the rail systems, the coaster systems, the light rails, in a timely fashion. Because, quite frankly, we're seeing a lot of you folks from Sacramento. This is a beautiful day. That's the reason people are moving to San Diego, that's one of the reasons. We need to be able to accommodate that growth. Whether you want it or not it's going to be here. I want to be able to tell the citizens that this is going to be done in a timely fashion.

Then from a selfish perspective, the jobs that are created by those type of infrastructure jobs are the jobs that pay liveable wages, that provide health benefits for the members that we represent and their families, pension benefits, apprenticeship programs that develop the skilled workforce in order to keep this community thriving. What I want: I don't want theory, I want guarantees that this is in fact going to happen.

Assemblywoman Ducheny:

That's the notice issue. Kevin. Thank you.

Kevin Johnson:

Thank you. I wanted to add my voice to the opinions here that this case, the Bolsa Chica case, really does not change anything in terms of the law. It's a case basically that was unique in terms of the facts. It was a case that was unique in terms of the lack of expertise that went into building a record to support the range of conclusions that could have been reached under the existing law. So if there's a need to go forward, it should not be because of the Bolsa Chica case. Just to underscore that, we're not looking at a single project right now that's been stopped because of the Bolsa Chica case.

We're not hearing somebody projecting a specific project that's going to be stopped. In fact we're getting assurances from the Coastal Commission people that the flexibility is there and that they can work around these things based upon what is really a long-established sort of ecosystem, if you will, of laws and definitions. Now, to the extent that there are other complaints about inconsistency. Clearly that's a problem. But as long as we have a federal form of government here, we're going to have the state with their standards and the federal government with their standards, and they're never going to get together in all probability.

I would suggest that if anybody wanted to launch off on an effort to try and reconcile all these things you're going to be getting into a career-long project which will ultimately end up probably not getting anywhere. A Pandora's Box is like an understatement in terms of this.

In picking up on a theme Art brought up in terms of the local level. When you're talking about, do we need to get into this? I see a lot of projects at the local level that work around some of these unique problems where a drainage ditch has suddenly become a wetland. I can think of a project right now up in the Encinitas area where I live. There's a 20-acre parcel that's very close to the San Allejo Lagoon, and there's a watercourse that goes right down the middle of it. Well, the developer was very, very exacting in terms of how they approached it. They made sure that none of the development was going to be within a hundred feet of the wetland, and they built every place else. Their specific goal was to avoid having to get into any uncertainty associated with wetlands, which I think brings me to another point.

If people want to know what the certainty is about wetlands the certainty is, stay away from them because you're going to get yourself into what the Army Corps says versus what the Coastal Commission says versus what the local jurisdiction says. Now, I'm not hearing the local jurisdictions coming to you, the ones that are processing in San Diego County alone, hundreds if not thousands of projects touching on and relating to wetlands. They're not coming forward and saying we need to change this, we don't know what to do. The fact of the matter is, they work their problems out.

Now there are projects that some of the developer representatives have that are a specific problem, and I would suggest that those need to be dealt with on a case-by-case basis in lieu of taking their example and trying to change the law to fit everything else that's getting by with out a problem. The subject of transportation, which Art brought up and has been a theme here, I think is obviously a critical one for all of us. Again referring to a local perspective now. The San Allejo Lagoon Conservancy, which I'm involved in, we can't wait for the double-tracking of the tracks there across San Allejo Lagoon because the current single track is sitting on a berm which completely screws up the title influence of the lagoon.

When they're going to do the double-tracking, and I believe that's going to occur eventually and it should, we're going to see it on trestles we believe, and that will be a major enhancement in terms of our ecosystem. Very consistent with the Coastal Act and I think that's exactly what Peter is talking about when you're talking about the Coastal Commission being able to look at that other priority being balanced and saying, yeah, we're going to go in there and, sure, we're going to have some trestles. It might be a little bit bigger footprint but, boy, it's going to work a lot better.

So they have the opportunity and the creativity right now under the existing system to make these systems work for us to accommodate our transportation needs. However, I just want to state right now that if you're hearing at this point in time that this may be a problem...

Assemblywoman Ducheny:

You're hearing fear. You know what I mean? I think you heard as much as I did. I'm hearing fear, I'm hearing concern that things, the way they're read, could be interpreted in subsequent decisions to be in ways that make it difficult for folks to have a sense of fun of where they need to go. I think that's what I'm hearing --- everything else.

Bill Boyd:

There's one aspect of this, I think, in terms of the point Mr. Johnson just made, there's been a tendency to view the Bolsa Chica decision as, oh, well better findings would have done it. Where the transportation facility thing comes in, and it still gets back to the language I was concerned with earlier. The Commission made very elaborate findings that the widening of Warner Avenue allowed the Commission to remove, eliminate two roads that would have been built, one through the Bolsa Chica Lowlands and the other through Rabbit Island under the 1986 land-use plan that was approved by the Commission.

They specifically found that the widening of one road eliminated two roads that otherwise would have had to been built through environmentally-sensitive areas and wetlands, and it was to maintain the existing LOS to accommodate future regional growth, and it's a coastal access road. So my concern is, this was not a question of inadequate findings. In fact that's the kind of balancing that we've been talking about. I'm not talking about rape, pillage and burn. We're talking about constraints in the transportation systems and what are our alternatives. If you look at the findings the Commission made, they're extremely good findings.

The Commission didn't use the balancing provision of the act and the concern that I have is, in reading the language of the opinion, is that it certainly leaves open a litigation avenue for someone who says, this opinion says you really should not be using the balancing provision for that section. Peter's indicated the Commission believes it can go in the other direction. But I think it's dangerous to say, oh, well, the findings didn't do this. The findings really did very carefully address a balancing provision.

Kevin Johnson (??):

If I may, may I respond to that?

Assemblywoman Ducheny:

Yes.

Kevin Johnson:

The findings though, I think, if I'm remembering the opinion correctly, these findings that you're referring to are not specifically referenced in the opinion. Is that correct?

Male Voice:

Yeah. The court didn't actually, I think the court ---, to some extent went past those but it did not address that at all. The court looked at whether something is an allowable use and whether it meant the definition of incidental public service in terms of expanding a road to accommodate future regional development.

Kevin Johnson:

The point that I was going to make, in terms of your concern that it's going to be used as a precedent and what's the precedent is the language of the opinion not the record underneath it. In other words, nobody's going to go use that as a controlling example in terms of another court case.

Assemblywoman Ducheny:

But the language, forgive me for doing this, playing the game, but I mean that's where the issue comes up because the language says, and the question I suppose, I mean I don't want to get into all the (---inaudible---) stuff, and Art's right. Thank you for (---inaudible---). But the problem is, is the dictum. Is it real? Is it precedent? It says, 'roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity.' If you take that literally, it precludes your double trestles. So it doesn't make sense and that wouldn't make sense. But if you took that sentence literally, you could find yourself in a place where you said, well, you can't widen 95 another five feet to get a shoulder. You know what I mean?

Kevin Johnson (??):

I was just going to say, not to take too much time. Obviously that can be argued. You can take anything anywhere in the opinion but that's the case with every court decision. You can always find something to support your case. Again, how is it going to be applied and is it really going to be a problem, we haven't seen it yet.

Assemblywoman Ducheny:

Right. No, it's true. But I think that's what you're hearing when you asked before. What you're hearing is fear that it could be applied in such a way that folks get way down the road before they figure out that, or just decide they want to stay away from things. Then you get the dead eucalyptus grove and you don't get the restored mountain lion Belsvero Habitat. That would be the concern, that people stay away from doing the projects that could result in positive environmental mitigations.

Kevin Johnson: Could be the result.

Assemblywoman Ducheny:

Well that's the point. But if you're hearing it from the folks from that are the folks that would have to put up the money to do it then it's something to be at least concerned about. That's all. Mr. Johnson, Long Beach. We haven't heard from a port yet, and then Pat, and then I'll bounce back --- ---.

Mr. Johnson:

Well the Port of Long Beach and Los Angeles as well are really only involved in this wetlands issue as restorers of wetlands. We don't develop wetlands so filling wetlands for development purposes isn't so much an issue for us. We've done a number of restorations as most of you probably know. They've been getting more contentious and complex with each one. The Badoquitos one was quite difficult. Future restorations are going to be even more complex and I think involve more decisions and balancing acts on the part of the Coastal Commission as well as the federal agencies.

With that in mind we were brought here sort of at the last moment by the kind of disturbing language in the invitation that said, 'fill of coastal wetlands in connection with restoration of degraded wetlands would be prohibited' and of course that immediately perked our ears up. Because occasionally in a restoration it is necessary, as Peter knows from having butted heads probably with the Port of Los Angeles, it's necessary to relocate habitat reconstructed elsewhere within the sight simply to get the proper function of the wetland. So we were troubled by that and I came down and I've been listening to this testimony and it's been very conflicting on this issue.

But on balance I hear Peter saying that he feels his agency's flexibility and mandate is not affected by this decision. We often don't agree with Peter but we often do agree with Peter. Whichever way we go we always, I think, trust him and rely on his judgement. So I feel very comforted, I think, that both environmental interest and the Coastal Commission staff don't feel unduly constrained by this decision because, as I say, we rely on both groups to help us

through our process which is restoring degraded wetlands to foster port development. Basically in order to take the load off the Port of San Diego.

I think we'll continue to watch this because clearly it's a very important issue for us but right now I'm hearing that it's not of a great deal of concern to the ports.

Peter Douglas:

I would just add and follow up on what Tom was saying that I think that it does affect us in the sense that we have to look more closely at the benefits, the goals that are being achieved by the project that are consistent with coastal act policies, and I think that the concerns that you hear. It's fascinating to me to hear because I heard this when we were working on the Coastal Act in '70, '71, '72, we want certainty, we want specificity. Well, when we gave it that wasn't what was wanted either because people wanted flexibility then. They didn't want to have a specific definition.

So I think, and what we built into this definition when it was created was recognizing that scientists were going to have to make decisions, biologists were going to have to make decisions as to whether or not a particular so-called ditch does actually have habitat values. That's the process we go through when you...we just had a session with our biologist explaining how you identify environmentally-sensitive habitat or a wetland and it's a very involved process.

It isn't just a matter of looking at a piece of land and seeing water on it and saying that that's a wetland. It's looking at the values that are inherent in that particular wet area that makes it either a habitat or not. So there's a process that we go through, and I think it's over-simplification to say just because it's a ditch and has water in it it's considered a wetland and therefore is subject to these strict interpretations. That simply isn't the case. You have to evaluate it. So I think in terms of how you approach this and say you want certainty, I think sometimes you do and sometimes you don't. I think that that's something that perhaps we need a process that everybody understands.

It's got to be open, it's got to be transparent, it's got to be fair. I think we have to be responsive to people when they come in and ask questions about what's expected of them. Sometimes they don't like the answers that they get but at least we have an obligation and I think we do a good job telling them what's expected, then they can work with that. If we don't do that part we're not doing our job. What the Corps of Engineers does, the federal agencies, we have not control over that. We try to work together.

In fact with the ports I think we have developed a process there of bringing all the agencies together in this contaminated sediment task force that we had there, for example, and the group that came out of that bringing all the federal and local agencies together so that we are on the same page. I think that kind of approach is much more sensible than the incremental, piece-by-piece, kind of go to one agency first and then go to the other kind of approach. That seems to me to make a lot more sense than trying to change a definition that maybe is simple in the act but in the application is actually a lot more sophisticated than people make it sound.

Assemblywoman Ducheny:

Let me get, and I know some other folks still haven't, but we haven't heard from Imperial Beach yet and then Mark Pat.

Patricia McCov:

Yes. I haven't really followed the Bolsa Chica decision until recently. I also have to confess I'm a member of EGAD. What I want to say is Dr. Sadler, who's worked with us down in the Tijuana National ESHA Research Reserve, has made it very clear that however much we try to replicate a wetland, it's really not possible. What we get is a more or less okay thing. I've done several restorations, and one gets very excited when the odd bird starts plopping into it, and then it gets better and the vegetation takes hold, and you almost feel like a creator. But make no mistake about it, it is not, it cannot be exactly replicated.

What I really also feel, that in the 30 years that I've been working in coastal wetlands in South County, we've done battle. There have been shootings. I live in Imperial Beach which some people sort of think is on another planet. We take our politics very seriously with our bread and butter. Over the years there's been a mellowing in the community. I've found that litigation takes a long time for a community to overcome, and it should be avoided as much as possible. I sight in this instance the work we've done with Bill Tusha on Crystal Bay.

Bill knows I'm a dyed-in-the-wool environmentalist and he says he's in for economic development. So with those caveats on the table a whole bunch of us were able to sit down and for a year-and-a-half, two years and hammer it out as friends. It worked very well. The outcome is yet to be seen but what was good for the environment was definitely good for the economy. Because we're pushing ourselves away from a place at the table. Obviously growth is something that we can't deal with but you mentioned the SANDAG, their prophecies for the 2020 year, and we're looking at mass transit, we're doing everything we can so that people don't have to go miles and miles to go to their jobs etc., which is another philosophical thing that we're coming into.

We're looking at fuel cells and everything else. But the wetlands issue is a quality of life issue. I am very comfortable with the way that the Act has evolved, the interpretation, over the years since 1971-72 when it was written and until it was put in place. I feel that the conditions set out there in the eight major conditions and the --- that deal with the Bolsa Chica issue and others I think aren't broken really, and I'm at the school 'if it ain't broke, don't fix it.' I don't like to meddle with something that has served this state so well over the last 20+ years.

I'm sorry if I sound like Pollyanna but that's how I feel about it, and I really don't want to monkey with that act. We've had our battles down there. We have probably two of the largest wetlands in the state because we have the bay on the one side, that new South Bay refuge and then the big Tijuana, 2600 acres to the south. So that's my own person experience and that's all I can really share.

Assemblywoman Duchenv:

I appreciate that and it's helpful to the discussion. Mark.

Mark Nelson, San Diego Gas & Electric:

Thank you. I want to extend our appreciation for the opportunity to make some comments. It's good to see some familiar and friendly faces here. I'm Mark Nelson. I'm representing San Diego Gas & Electric, a Sempra company. I'm not an attorney and I don't play one on T.V. so I will not try to interpret the Bolsa Chica decision for those who are better-qualified than I to do that. In fact I'm not quite sure that that decision materially affects the operation of San Diego Gas & Electric's facilities. But to the extent that this debate, this discussion, opens the door for issues or ambiguities, as an applicant before the Commission I would like to raise just two points if I might.

I think Mr. Douglas knows this, that energy projects are really considered as in the Commission's area of primary jurisdiction, even if they're geographically outside. For example, you could have an energy facility that's within an adopted LCP but because it's an energy facility it's within their primary jurisdiction. That can create some conflict for us as we try to balance the local agencies' needs against those of the Commission's and we find ourselves kind of caught in that gristmill. Now whether or not that takes a legislative fix or one of an interpretation I'm not prepared to say today but it has been the product of some probably wasted effort on everybody's time to try to sort that out.

Another item I'd like just to raise is that energy facilities themselves are not treated as essential services and though we have a constitution obligation to serve. It's a health and safety aspect to provide electricity to customers in the San Diego SDG&E service territory. To the extent to which we build a transmission line that might be within the primary jurisdiction and get the necessary entitlements to do that, maintenance of that facility, unlike a developer who might build houses and then goes someplace else and builds another, we have an ongoing presence. One of the things I'd like to work with the Commission and if necessary the legislature to deal with is, how often do we have to

go back to the Commission to seek additional permits when the original one has already been granted for the permit to construct.

Perhaps during the initial phases of permitting for, I'll call it a linear facility, we can work out protocols for maintenance. Access roads are a critical element to maintaining electric and gas transmission systems, in the extent to which those roads need regular maintenance. The extent to which we have to continue to go back in and seek new permits to do that is a cost to be born by the customers in this area and I suspect the same is true throughout California. These are just issues that we wanted to raise yet again in this form and I appreciate the opportunity to do it and look forward to working with the appropriate individuals to pursue this.

Assemblywoman Ducheny:

Alright. Larry, you had yours up or Kevin. Does anybody else from out there want to make any comments that hasn't been heard from yet? I know Pat's going to have to leave and I know all of us...two hours of this is about as much as any of us can take. I really appreciate...did anybody else having any sort of concluding, Ned or I know Larry had yours up and down. Alright. I just think we continue to need to just sort of think about it. I appreciate everybody's time in trying...as people talk to me about this I at least, a lot of you know this already, can't figure those things out unless I have everybody talking about it at one time.

It's helpful, certainly, to our process to hear different interpretations and have people...and I appreciate everybody coming because the other thing is for everybody to hear each other's because sometimes it gives you an opportunity to go back and re-look at things and really suggest ways to do it. I think what we've heard today is the concern and I think the one I had heard voiced the most, or the one that gave me the most concern, was whether, in fact, you were able to apply these balancing tests. Now, this same Commission is now saying, yeah, we still think we can apply balancing tests, but that of course hasn't been tested yet, subsequent to Bolsa Chica and that's one of those that creates an issue, kinds of questions.

Nobody's taken that phrase that Bill is concerned about and said, nope, that's what it said. Sorry. You know you can't make that decision, and I think that's the gray area that we're walking in. So to the extent, and I appreciate a lot of you being here and if there are specific examples for some of you who may not have spoken of issues that you're concerned about and where you think things that have been good projects like the one described in Orange County that might not be permitted. I think that was the fear is that we've seen good projects. Even --- somebody talked to me about one in the San Jose/San Mateo areas and ---.

Good projects that went forward in ways that somebody looking at this on the surface felt might have been precluded in a subsequent way. I think that's the issue we just kind of need to keep our eye on and that people are concerned about. We will not be going back into session until January in Sacramento so it gives folks a chance to think about this. I'd appreciate it if there is continuing concern that folks who are here, we have a list. We can put you all in touch with each other if you don't know each other. Anybody you don't know that you think about something after you go home or talk to your other partners or counsel or anybody else and want to kind of revisit or think about it, we'll try to get information to anybody who's interested that we have.

Mostly what we have is like the decision and some things that some people may not have seen yet. But if people have ideas or think about specific things, and I appreciate Mr. Washburn sort of saying, look, I think these are the ones we need to look at. If people have ideas like that the way we've worked these --- in the past, we start to sort of circulate them and see where we can go if, in fact, for instance the ports you sort of talk and you say, gee, I think there is, you know, as you go back and talk amongst yourselves think of something, we appreciate hearing. We don't know, and I apologize for the invitation. It worked. It got you all here.

It was meant to say, and I think I said, if in fact, and the question was is there some need, and I'm hearing sort of, yeah, I think there is and no I...

(End of Side 1 - Tape 2)

ATTACHMENT 7

BILL ANALYSIS, CALIFORNIA COASTAL COMMISSION,
ASSEMBLY BILL 2310 (2000), DATED FEBRUARY 29, 2000

BILL ANALYSIS

DEPARTMENT Coastal Commission	AUTHOR Duchenev	BILL NUMBER AB 2310
SUBJECT Public Resources Code: Resource Planning and Management		DATE LAST AMENDED 2/25/00
<p>I. SUMMARY:</p> <p>A. Bill Summary:</p> <p>This bill would amend Sections 30233, 30240 and 30411 of the Public Resources Code (California Coastal Act) to include recreational, residential and commercial development as allowable uses in degraded coastal wetlands; allow transportation projects in wetlands and other development in areas designated as Environmentally Sensitive Habitat Areas (ESHAs); and change the current 'balancing provision' of the Act to allow the Commission to permit more intensive, non coastal-dependent uses in wetlands and ESHAs by balancing the broad programmatic goals in Chapter 1 of the Act, against the specific resource protection policies contained in Chapter 3 of the Act. Under this proposed bill, the Commission could allow development not otherwise permitted in wetlands found to be 'degraded' by the Department of Fish and Game, if, in conjunction with such development, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. Development in ESHAs could be allowed if the Commission finds habitat values to be degraded and that higher habitat values of the same type could potentially be achieved at another location through protection, maintenance, enhancement, creation or restoration of those values.</p> <p>The bill also prohibits the Commission from taking actions in conflict with Habitat Conservation Plans (HCPs) and Natural Community Conservation Plans (NCCPs) approved by the Department of Fish and Game.</p> <p>B. Summary of Issues/Concerns:</p> <p>The revisions to these sections would allow the Commission to approve significantly more development, and more types of development, in wetlands and ESHAs. By allowing the Commission to balance broad Chapter 1 goals and objectives against specific Chapter 3 policies, the Commission would be able to make findings and approve projects that directly conflict with the Coastal Act, as written. It also seeks to exempt HCPs and NCCPs within the Coastal Zone from Coastal Commission review. AB 2310 would allow offsite mitigation for filling of wetlands less than one acre in size, potentially resulting in a net loss of coastal wetlands. Collectively, this proposal would significantly weaken the environmental protection policies of Coastal Act, and allow for substantial loss of coastal resources historically protected by the Act.</p> <p>C. Fiscal Summary:</p> <p>The Coastal Commission could incur costs due to an increase in permit applications, litigation and LCP amendments as the result of increasing the number and type of allowable uses in wetlands and ESHAs. The potential for de-certification of the state's coastal program puts current and future federal funding at risk.</p> <p>D. Sponsorship: California Building Industry Association</p> <p>E. Related Legislation: SB 2086 (Bowen)</p> <p>F. Support and Opposition: Support: Unknown at this time Opposition: Unknown at this time</p> <p>For information contact: Sarah Christie, Legislative Coordinator Phone: 445-6067 Prepared by: Sarah Christie Date: 2/29/00</p>		

II. ANALYSIS:

A. Existing Law:

Wetlands

The Coastal Act provides the highest degree of protection for coastal wetlands, due to their important function in coastal ecosystems, their scarcity (California has lost over 95% of its coastal wetlands in southern California) their critical habitat value for rare and endangered species, and their important role in marine fisheries.

Current law (PRC Section 30233) permits wetland fills only for the following uses:

- New or expanded port, energy and coastal-dependent industrial facilities
- Maintaining existing navigation channels, mooring areas and boat ramps,
- Incidental public services (utility lines, cables, etc)
- Mineral extraction, including sand excavation
- Restoration, and
- Nature study and aquaculture

No other uses in wetlands may be approved in accordance with the Coastal Act unless the Commission makes the necessary findings that denial of a project would create a conflict with another specific Coastal Act policy (such as protecting coastal-dependant agriculture, water quality, biological productivity of coastal waters, etc.) In such cases, the Commission may approve wetland fill or dredging using the balancing provision contained in section 30075.5, but only if the project approval is the environmentally superior alternative. For instance, if a project requiring a wetland fill incorporates practices which improve water quality overall, the Commission has the discretion to approve it.

ESHA

Environmentally Sensitive Habitat Areas are defined in Section 30107.5 as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." While wetlands are a type of ESHA, other examples of ESHAs include riparian corridors, endangered species habitat, native grasslands, oak woodlands, Monterey pine forests, dune habitat, etc.

Environmentally Sensitive Habitat Areas are protected under Section 30240, which states that they "...shall be protected against any significant disruption of habitat values, and only uses dependant on those resources shall be allowed in those areas."

Uses dependent on the ESHA may include research facilities, trails, nature studies, recreation, public education, etc.

Again, specific findings using the balancing provision must be made in order to allow development which is more intensive than what is allowable under Section 30240.

B. This Bill Would:

- Add residential, commercial and recreational development to the list of allowable uses in degraded wetlands if accompanied by restoration of a substantial portion of the remaining wetland.
- Allow destruction of a degraded wetland (as defined by the Department of Fish and Game) less than 1 acre in size if a "biologically productive wetland" is provided elsewhere.
- Broaden the balancing provision in section 30007.5 to allow the Commission to override Chapter 3 wetland and ESHA protection policies by applying the general goals and objectives contained in Chapter 1.
- Allow wetland fill or ESHA destruction for transportation projects (e.g., highways and freeways, toll roads, parking lots and garages, rail and transit projects).
- Allow any non-resource dependent use in ESHA if the Commission determines that higher habitat values of the same type can be achieved at another location through the protection, maintenance, enhancement, creation or restoration of those values.
- Exempt HCPs and NCCPs from Coastal Commission review.

C. Issues/Concerns

- Wetlands are essential to the health of coastal ecosystems, and are thus afforded a high degree of protection under the Coastal Act. Over 95% of southern California wetlands have been lost to development or other human impacts. Because so few wetlands remain and areas suitable for restoration are limited, preservation of California's wetland protection policies should remain as strong as possible. In addition, industrial uses currently allowed under the Coastal Act, such as commercial ports, must find areas that can be restored as mitigation for their projects. Adding recreational, residential and commercial uses in degraded wetlands as allowable uses in conjunction with restoration will cause a further loss of coastal wetlands and increases the competition for (and cost of) remaining mitigation sites for projects currently consistent with the Act.
- Allowing destruction of degraded wetlands less than one acre in size so long as "biologically productive" wetlands are provided elsewhere could lead to a net loss of coastal wetlands, if the mitigation site is outside the Coastal Zone, or if the mitigation simply restores or maintains, but does not expand, an existing site.

- AB 2310 would change existing Commission practice when applying the balancing provision in section 3007.5. It would allow the Commission to use the broad goals and objectives contained in Chapter 1 of the Act to override the specific resource protection provisions contained in Chapter 3. Under existing law, the Commission may approve development not otherwise allowable if, a) denial of the project creates a conflict between two or more specific Chapter 3 policies, and b) the project results in a net environmental benefit. If AB 2310 is enacted, the Commission could approve destruction of wetlands and ESHA (whether degraded or not), agricultural lands, public access, landforms, scenic views and commercial fisheries facilities if it found that the proposed development "...balanced utilization ... of coastal zone resources taking into account the social and economic needs of the people of the state." (section 30001.5 PRC)
- The bill also allows wetland destruction for transportation projects that further public access to or along the coast, based on current or future needs. Since any transportation project in the Coastal Zone could arguably enhance public access, either now or in the future, this provision would allow virtually any highway, freeway, toll road, parking lots, parking garages, or rail construction or expansion to be approved in wetlands or ESHA. The Commission currently has the ability to approve some transportation development in ESHAs, provided section 30007.5 is properly applied. AB 2310 would remove the Commission's current authority to require environmentally superior conditions on transportation projects.
- The provisions of AB 2310 relating to ESHAs would allow destruction of any ESHA if the Commission chooses to use the new, expansive reading of section 30007.5 if it finds that, "on balance," impacted habitat values can be provided in other locations with the "potential" of maintaining long-term habitat values. This will result in a net loss of ESHAs, in two ways. First, it only requires the protection and/or enhancement of existing habitat values elsewhere. Second, it requires only that the mitigation site have the *potential* to provide such values.
- AB 2310 exempts Habitat Conservation Plans and Natural Community Conservation Plans from Coastal Commission review. In some cases, the Commission has recognized such plans as meeting Coastal Act policies and has approved coastal development permits pointing to the application of such plans as meeting habitat protection policies of chapter 3. But in many cases their preparation was undertaken without Coastal Commission participation and may not be consistent with Chapter 3. If this provision in AB 2310 becomes law, the Commission could do nothing to prevent the loss of ESHA within the coastal zone even though the protected habitat used to justify such loss may not be coastal specific and is located well outside the coastal zone. This provision would in effect repeal Coastal Act policies to protect habitat values in the coastal zone in areas with HCPs or NCCPs that protect public and private lands inland of the coastal zone.
- California's coastal management program (CCMP) was approved by the federal government in 1977 and includes the strong coastal wetland and ESHA protection policies of chapter 3. As a result of federal approval of California's coastal management program, California gained regulatory review authority over any federal action, including permits and licenses for any activity that could affect coastal resources. This includes Commission authority over offshore oil and gas development, military projects (i.e., the Navy's homeporting of nuclear carriers in San Diego Bay), Corps of Engineers permits and dredging projects (i.e. the Border Fence), national park projects and nation wide permits by EPA and the Corps of Engineers. Any major amendment of the CCMP requires approval from the federal Office of Ocean and Coastal Resources Management in the National Oceanic and Atmospheric Administration in the Department of Commerce. The proposed amendments in AB 2310 could result in the decertification of California's program with a resulting loss of federal consistency review authority and federal funding.

III. BACKGROUND

This bill was conceived in response to a 1999 Fourth Appellate District Court of Appeals decision on *Bolsa Chica Land Trust et al v. the Trial Court of San Diego County*. In that case, the Commission approved an amendment to the Orange County certified Local Coastal Program, allowing the construction of 900 homes in wetlands, and 2,500 homes on Huntington Mesa in a 1,588 acre undeveloped area known as Bolsa Chica. The project required substantial wetland fills in the lowlands, and destruction of a grove of eucalyptus trees on the mesa, designated as an ESHA in the LCP because of its habitat value for raptors. A road expansion to accommodate additional traffic would also require some wetland fill. Although the Coastal Act permits ESHA destruction only for those activities dependent on those resources, and contemplates very few allowable uses in wetlands (not including residential development), the Commission found that because the developer intended to restore a portion of the wetlands with proceeds from home sales, and replace the eucalyptus grove with newly planted native trees and nesting boxes, that the project was approvable. Several environmental groups sued the Commission and the developer on March 6, 1996.

The trial court upheld the Commission's approval of the 2,500 homes on the mesa, but found that the approval of 900 homes in a wetland was inconsistent with the Coastal Act. The project proponents appealed the decision, which the appellate court upheld. Additionally, the appellate court found that the development on the mesa was inconsistent with the Coastal Act, which states ESHAs "...shall be protected against any significant disruption of habitat values, and only resources dependant on those resources shall be allowed within those areas." It also found the Commission had not made the necessary findings that the filling of a wetland on the mesa to accommodate the widening of an existing road to serve the new development was consistent under the Coastal Act.

In short, the appellate court found that residential development is not one of the specific enumerated and narrowly defined allowable uses in wetlands, nor does it supercede the Coastal Act policy to protect environmentally sensitive habitat areas.

After the *Bolsa Chica* court decision, the Commission determined not to take issue with that ruling and instead concluded that it could carry out Coastal Act requirements consistent with the decision by being careful to allow adverse impacts on ESHAs and wetlands only where a conflict between specific chapter 3 policies can be resolved in a manner that is, on balance, most protective of significant coastal resources.

The language in AB 2310 goes beyond the *Bolsa Chica* decision by specifically allowing residential, recreational and commercial development in wetlands. It makes it possible to justify the destruction of ESHA by trading off any Coastal Act provisions shown to be in conflict. The Commission has already found a way to operate within the parameters of the *Bolsa Chica* decision to allow appropriate new development projects to proceed, using the existing balancing provision.

IV. RECOMMENDATION:

A. Position:

Oppose

B. Reason for Recommendation:

AB 2310 would significantly weaken the Coastal Act, putting coastal resources and the state's federal consistency review authority at risk. The Coastal Commission currently has the discretion and the tools to approve reasonable development in the Coastal Zone using the existing balancing provision. This legislation attempts to solve a problem that has not been demonstrated to exist by allowing the Commission more discretion to approve types of development not contemplated by the voters when they passed the Coastal Initiative in 1972, nor the Legislature when it approved the Coastal Act in 1976.

ASSEMBLY BILL

No. 2310

**Introduced by Assembly Member Ducheny
(Coauthors: Assembly Members Bates and Calderon)**

February 24, 2000

An act to amend Sections 30233, 30240, and 30411 of the Public Resources Code, relating to resource planning and management.

LEGISLATIVE COUNSEL'S DIGEST

AB 2310, as introduced, Ducheny. Resource planning and management.

(1) Existing law permits the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes if there is no feasible less environmentally damaging alternative and if feasible mitigation measures have been provided to minimize adverse environmental effects. Existing law limits diking, filling, or dredging to certain situations, including entrance channels for new or expanded boating facilities in wetlands areas, and in a degraded wetland for boating facilities.

This bill would expand the activities permissible in a degraded wetland, as defined, to include recreation, residential, and commercial projects.

(2) Existing law requires that environmentally sensitive habitat areas be protected against any significant disruption of habitat values and requires that only uses dependent on those resources be allowed within those areas.

This bill would allow uses not dependent on the habitat values under certain conditions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 30233 of the Public Resources
2 Code is amended to read:
3 30233. (a) The diking, filling, or dredging of open
4 coastal waters, wetlands, estuaries, and lakes shall be
5 permitted in accordance with other applicable provisions
6 of this division, ~~where if~~ there is no feasible less
7 environmentally damaging alternative, ~~and where~~ and if
8 feasible mitigation measures have been provided to
9 minimize adverse environmental effects, and shall be
10 limited to the following:

11 (1) New or expanded port, energy, and
12 coastal-dependent industrial facilities, including
13 commercial fishing facilities.

14 (2) Maintaining existing, or restoring previously
15 dredged, depths in existing navigational channels,
16 turning basins, vessel berthing and mooring areas, and
17 boat launching ramps.

18 (3) In wetland areas only, entrance channels for new
19 or expanded boating facilities; and in a degraded wetland,
20 identified by the Department of Fish and Game pursuant
21 to subdivision (b) of Section 30411, for *recreation,*
22 *residential, or commercial projects, or* boating facilities if,
23 in conjunction with ~~such boating~~ *those projects or*
24 facilities, a substantial portion of the degraded wetland is
25 restored and maintained as a biologically productive
26 wetland. The size of the wetland area used for ~~boating~~
27 *those projects and* facilities, including berthing space,
28 turning basins, necessary navigation channels, and any
29 necessary support service facilities shall not exceed 25
30 percent of the degraded wetland. *However, if the*
31 *degraded wetland is less than one acre in size, mitigation*
32 *may be provided through restoration and maintenance of*
33 *a biologically productive wetland at an offsite location.*

34 (4) In open coastal waters, other than wetlands,
35 including streams, estuaries, and lakes, new or expanded

1 boating facilities and the placement of structural pilings
2 for public recreational piers that provide public access
3 and recreational opportunities.

4 (5) Incidental public service purposes, including, but
5 not limited to, burying cables and pipes or inspection of
6 piers and maintenance of existing intake and outfall lines.

7 (6) Mineral extraction, including sand for restoring
8 beaches, except in environmentally sensitive areas.

9 (7) Restoration purposes.

10 (8) Nature study, aquaculture, or similar
11 resource-dependent activities.

12 (9) *The expansion of existing transportation facilities*
13 *or construction of new transportation facilities that*
14 *further public access to, or along, the coast based on*
15 *current or future needs. Projects that reduce, or*
16 *otherwise address present or future demands on, coastal*
17 *zone transportation facilities are consistent with this*
18 *paragraph.*

19 (b) Dredging and spoils disposal shall be planned and
20 carried out to avoid significant disruption to marine and
21 wildlife habitats and water circulation. Dredge spoils
22 suitable for beach replenishment should be transported
23 for ~~such~~ those purposes to appropriate beaches or into
24 suitable longshore current systems.

25 (c) In addition to the other provisions of this section,
26 diking, filling, or dredging in existing estuaries and
27 wetlands shall maintain or enhance the functional
28 capacity of the wetland or estuary. Any alteration of
29 coastal wetlands identified by the Department of Fish
30 and Game, including, but not limited to, the 19 coastal
31 wetlands identified in its report entitled, "Acquisition
32 Priorities for the Coastal Wetlands of ~~California~~,"
33 *California*," shall be limited to very minor incidental
34 public facilities, restorative measures, nature study,
35 commercial fishing facilities in Bodega Bay, and
36 development in already developed parts of south San
37 Diego Bay, if otherwise in accordance with this division.

38 For the purposes of this section, "commercial fishing
39 facilities in Bodega Bay" means that not less than 80
40 percent of all boating facilities proposed to be developed

1 or improved, where ~~such~~ *that* improvement would create
2 additional berths in Bodega Bay, shall be designed and
3 used for commercial fishing activities.

4 (d) Erosion control and flood control facilities
5 constructed on watercourses can impede the movement
6 of sediment and nutrients ~~which~~ *that* would otherwise be
7 carried by storm runoff into coastal waters. To facilitate
8 the continued delivery of these sediments to the littoral
9 zone, whenever feasible, the material removed from
10 these facilities may be placed at appropriate points on the
11 shoreline in accordance with other applicable provisions
12 of this division, where feasible mitigation measures have
13 been provided to minimize adverse environmental
14 effects. Aspects that shall be considered before issuing a
15 coastal development permit for ~~such~~ *those* purposes are
16 the method of placement, time of year of placement, and
17 sensitivity of the placement area.

18 (e) *The commission may apply Section 30007.5 when*
19 *addressing any conflict between this section and any*
20 *other section of this division.*

21 SEC. 2. Section 30240 of the Public Resources Code is
22 amended to read:

23 30240. (a) Environmentally sensitive habitat areas
24 shall be protected against any significant disruption of
25 habitat values; and only uses dependent on those
26 resources shall be allowed within those areas. *Uses not*
27 *dependent on the habitat values of these areas are*
28 *allowed if either of the following applies:*

29 (1) *The commission determines that the habitat*
30 *values of the area are degraded and that higher habitat*
31 *values of the same type can be achieved at another*
32 *location through protection, maintenance,*
33 *enhancement, creation, or restoration of those value.*

34 (2) *The commission applies Section 30007.5 to any*
35 *conflict between this section and other sections, such as*
36 *Section 30250, and determines that, on balance, the*
37 *habitat values to be impacted can be provided for at*
38 *another location with greater potential for maintaining*
39 *long-term habitat values through any combination of*
40 *protection, maintenance, enhancement, creation, or*

1 *restoration to achieve a net increase in long-term habitat*
2 *value.*

3 (b) Development in areas adjacent to
4 environmentally sensitive habitat areas and parks and
5 recreation areas shall be sited and designed to prevent
6 impacts ~~which~~ *that* would significantly degrade those
7 areas, and shall be compatible with the continuance of
8 those habitat and recreation areas.

9 SEC. 3. Section 30411 of the Public Resources Code is
10 amended to read:

11 30411. (a) The Department of Fish and Game and
12 the Fish and Game Commission are the principal state
13 agencies responsible for the establishment and control of
14 wildlife and fishery management programs and the
15 commission shall not establish or impose any controls with
16 respect thereto that duplicate or exceed regulatory
17 controls established by these agencies pursuant to specific
18 statutory requirements or authorization, *including*
19 *conservation plans adopted consistent with Sections 2080,*
20 *2080.1, 2081, 2081.5, 2830, and 2835 of the Fish and Game*
21 *Code.*

22 (b) The Department of Fish and Game, in
23 consultation with the commission and the Department of
24 Boating and Waterways, may study degraded wetlands
25 and identify those ~~which~~ *that* can most feasibly be
26 restored in conjunction with development of a
27 *recreational, residential, or commercial project, or*
28 *boating facility as provided in subdivision (a) of Section*
29 *30233. Any such study shall include consideration of all of*
30 *the following:*

31 (1) Whether the wetland is so severely degraded and
32 its natural processes so substantially impaired that it is not
33 capable of recovering and maintaining a high level of
34 biological productivity without major restoration
35 activities.

36 (2) Whether a substantial portion of the degraded
37 wetland, but in no event less than 75 percent, can be
38 restored and maintained as a highly productive wetland
39 in conjunction with a *recreational, residential, or*
40 *commercial project or boating facilities project facility.*

1 (3) Whether restoration of the wetland's natural
2 values, including its biological productivity and wildlife
3 habitat features, can most feasibly be achieved and
4 maintained in conjunction with a *recreational,*
5 *residential, or commercial project or* boating facility or
6 whether there are other feasible ways to achieve ~~such~~
7 *those* values.

8 (c) The Legislature finds and declares that salt water
9 or brackish water aquaculture is a coastal-dependent use
10 ~~which that~~ should be encouraged to augment food
11 supplies and to further the policies set forth in Chapter 4
12 (commencing with Section 825) of Division 1. The
13 Department of Fish and Game may identify coastal sites
14 it determines to be appropriate for aquaculture facilities.
15 If the department identifies these sites, it shall transmit
16 information identifying the sites to the commission and
17 the relevant local government agency. The commission,
18 and where appropriate, local governments, ~~shall,~~
19 consistent with the coastal planning requirements of this
20 division, *shall* provide for as many coastal sites identified
21 by the Department of Fish and Game for any uses that are
22 consistent with the policies of Chapter 3 (commencing
23 with Section 30200) ~~of this division.~~

24 (d) Any agency of the state owning or managing land
25 in the coastal zone for public purposes shall be an active
26 participant in the selection of suitable sites for
27 aquaculture facilities and shall make the land available for
28 use in aquaculture when feasible and consistent with
29 other policies of this division and other provisions of law.

30 (e) The Department of Fish and Game ~~shall,~~ in
31 consultation with the Aquaculture Development
32 Committee, *shall* prepare programmatic environmental
33 impact reports for existing and potential commercial
34 aquaculture operations in both coastal and inland areas of
35 the state if both of the following conditions are met:

36 (1) Funds are appropriated to the department for this
37 purpose.

1 (2) Matching funds are provided by the aquaculture
2 industry.